Calendar No. 219

99TH CONGRESS *1st Session*	SENATE	REPORT No. 99-100

VETERANS' ADMINISTRATION ADJUDICATION PROCEDURE AND JUDICIAL REVIEW ACT

REPORT

OF THE

COMMITTEE ON VETERANS' AFFAIRS UNITED STATES SENATE

TO ACCOMPANY

S. 367

JULY 8, 1985.—Ordered to be printed

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Mr. MURKOWSKI, from the Committee on Veterans' Affairs, submitted the following

REPORT

[To accompany S. 367]

The Committee on Veterans' Affairs, to which was referred the bill (S. 367) to amend title 38, United States Code, to establish certain procedures for the adjudication of claims for benefits under laws administered by the Veterans' Administration; to apply the provisions of section 553 of title 5, United States Code, to rulemaking procedures of the Veterans' Administration; to provide for judicial review of certain final decisions of the Administrator of Veterans' Affairs; to provide for the payment of reasonable fees to attorneys for rendering legal representation to individuals claiming benefits under laws administered by the Veterans' Administration; and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

TEXT OF THE BILL, S. 367

The text of the bill as reported is as follows:

That (a) this Act may be cited as the "Veterans' Administration Adjudication Procedure and Judicial Review Act".

(b) Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of title 38, United States Code.

TITLE I—ADJUDICATION PROCEDURES

SEC. 101. (a) Chapter 51 is amended by adding at the end of subchapter I the following new section:

"§ 3007. Burden of proof; benefit of the doubt

"(a) Except when otherwise provided by the Administrator in accordance with the provisions of this title, a claimant for benefits under laws administered by the Veterans' Administration shall have the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded. The Administrator shall assist a claimant in developing the facts pertinent to his or her claim.

"(b) When, after consideration of all evidence and material of record in any proceeding before the Veterans' Administration involving a claim for benefits under laws administered by the Veterans' Administration, there is an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of such claim, the benefit of the doubt in resolving each such issue will be given to the claimant, but nothing in this section shall be construed as shifting from a claimant to the Administrator the burden described in subsection (a) of this section.".

(b)(1) The table of chapters at the beginning of title 38, United States Code, and the table of chapters at the beginning of part IV of such title are each amended in the item relating to chapter 51 by striking out "Applications" and inserting in lieu thereof "Claims".

(2) The heading of such chapter is amended to read as follows:

"CHAPTER 51—CLAIMS, EFFECTIVE DATES, AND PAYMENTS".

(c)(1) The table of sections at the beginning of such chapter is amended in the item relating to subchapter I by striking out "APPLICATIONS" and inserting in lieu thereof "CLAIMS".

(2) The heading of subchapter I of such chapter is amended to read as follows:

"Subchapter I—Claims".

(d) The table of sections at the beginning of such chapter is amended by adding after the item relating to section 3006 the following new item:

"3007. Burden of proof; benefit of the doubt.".

SEC. 102. Section 3311 is amended by adding at the end the following new sentences: "Subpenas authorized under this section shall be served by any individual authorized by the Administrator by (1) delivering a copy thereof to the individual named therein, or (2) mailing a copy thereof by registered or certified mail addressed to such individual

at such individual's last known dwelling place or principal place of business. A verified return by the individual so serving the subpena setting forth the manner of service, or, in the case of service by registered or certified mail, the return post office receipt therefor signed by the individual so served shall be proof of service.".

SEC. 103. Section 4001 is amended—

(1) in the second sentence of subsection (a), by inserting before the period at the end of such sentence "in a timely manner"; and

(2) by adding at the end thereof the following new subsection:

"(d) The Chairman of the Board shall submit a report to the appropriate committees of the Congress, not later than December 31, 1986, and annually thereafter, on the experience of the Board during the prior fiscal year together with projections for the fiscal year in which the report is submitted and the subsequent fiscal year. Such report shall contain, as a minimum, information specifying the number of cases appealed to the Board during the prior fiscal year, the number of cases pending before the Board at the beginning and end of such fiscal year, the number of such cases which were filed during each of the 24 months preceding the prior fiscal year and the then current fiscal year, respectively, the average length of time a case was before the Board between the time of the filing of an appeal and the disposition during the prior fiscal year, and the number of members of, and the professional, administrative, clerical, stenographic, and other personnel employed by the Board at the end of the prior fiscal year. The projections for the current fiscal year and subsequent fiscal year shall include, for each such year, estimates of the number of cases to be appealed to the Board and an evaluation of the Board's ability, based on existing and projected personnel levels, to ensure timely disposition of such appeals as provided for by subsection (a) of this section.".

SEC. 104. Section 4003 is amended—

(1) in subsection (a), by inserting a comma and "after notice of such additional information is furnished to the claimant and the claimant is provided an opportunity to be heard in connection with such information," after "concerned"; and

(2) in subsection (b)—

(A) by striking out "When" and inserting in lieu thereof "(1) Except as provided in paragraph (2), when";

(B) by inserting a comma and "after notice of such additional information is furnished to the claimant and the claimant is provided an opportunity to be heard in connection with such information," after "concerned"; and

(C) by adding at the end thereof the following new paragraph:

"(2) When, without the vote of a temporary member designated under section 4001(c)(1) of this title or the vote of an acting member designated under section 4002(a)(2)(A)(ii) of this title, a section would be evenly divided, such member shall not vote.".

SEC. 105. Section 4004 is amended—

(1) in subsection (a)—

(A) by striking out "involving" in the first sentence and inserting in lieu thereof "for"; and

(B) by inserting before the period at the end of the second sentence "after affording the claimant an opportunity for a hearing and shall be based exclusively on evidence and material of record in the proceeding and on applicable provisions of law";

(2) by striking out subsection (b) and inserting in lieu thereof the following:

"(b)(1) Except as provided in paragraph (2) of this subsection, when a claim is disallowed by the Board, it may not thereafter be reopened and allowed and no claim based upon the same factual basis shall be considered.

"(2) Following such a disallowance, the Board (directly or through the agency of original jurisdiction, as described in section 4005(b)(1) of this title)—

"(A) when new and material evidence is secured, shall, and

"(B) for good cause shown, may

authorize the reopening of a claim and a review of the Board's former decision.

"(3) A judicial decision under subchapter II of chapter 71 of this title, upholding, in whole or in part, the disallowance of a claim shall not diminish the Board's authority set forth in paragraph (2) of this subsection to authorize the reopening of a claim and a review of the former decision."; and

(3) by striking out subsection (d) and inserting in lieu thereof the following:

"(d) After reaching a decision in a case, the Board shall promptly mail notice of its decision to the claimant and the claimant's authorized representative, if any, at the last known address of the claimant and at the last known address of the claimant's authorized representative, if any. Each decision of the Board shall include—

"(1) a written statement of the Board's findings and conclusions, and reasons or bases therefor, on all material issues of fact and law and on matters of discretion presented on the record; and

"(2) an order granting appropriate relief or denying relief.".

SEC. 106. Section 4005(d)(5) is amended by striking out "will base its decision on the entire record and".

SEC. 107. Section 4009 is amended by adding after subsection (b) the following new subsection:

"(c) Whenever there exists in the evidence of record in an appeal case a substantial disagreement between the substantiated findings or opinions of two physicians with respect to an issue material to the outcome of the case, the Board shall, upon the request of the claimant and after taking appropriate action to attempt to resolve the disagreement, arrange for an advisory medical opinion in accordance with the procedure prescribed in subsection (b) of this section. If the Board denies the request of such claimant for such an opinion, the Board shall prepare and provide to the claimant and the claimant's authorized representative, if any, a statement setting forth the basis for its determination. Actions of the Board under this subsection, including any such denial, shall be final and conclusive, and no other official or any court of the United States shall have the power or jurisdiction to review any aspect of any such decision by an action in the nature of mandamus or otherwise, the provisions of subchapter II of chapter 71 of this title to the contrary notwithstanding.".

SEC. 108. (a) Chapter 71 is further amended by adding at the end thereof the following new sections:

"§ 4010. Adjudication procedures

"(a) For purposes of conducting any hearing, investigation, or other proceeding in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration, the Administrator may administer oaths and affirmations, examine witnesses, and receive evidence.

"(b) Any oral, documentary, or other evidence, even though inadmissible under the rules of evidence applicable to judicial proceedings, may be admitted in a hearing, investigation, or other proceeding in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration, but the Administrator, under regulations which the Administrator shall prescribe, may provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.

"(c)(1) In the course of any proceeding before the Board, any party to such proceeding or such party's authorized representative shall be afforded opportunity—

"(A) to examine and, on payment of a fee prescribed pursuant to section 3302(b) of this title (not to exceed the direct cost of duplication), obtain copies of the contents of the case files and all documents and records to be used by the Veterans' Administration at such proceeding;

"(B) to present witnesses and evidence, subject only to such restrictions as may be set forth in regulations which the Administrator shall prescribe, pursuant to subsection (b) of this section, as to materiality, relevance, and undue repetition;

"(C) to make oral argument and submit written contentions, in the form of a brief or similar document, on substantive and procedural issues;

"(D) to submit rebuttal evidence;

"(E) to present medical opinions and request an independent advisory medical opinion pursuant to section 4009(c) of this title; and

"(F) to serve written interrogatories on any person, including any employee of the Veterans' Administration, which interrogatories shall be answered separately and fully in writing and under oath unless written objection thereto, in whole or in part, is filed with the Administrator by the person to whom the interrogatories are directed or such person's representative.

"(2) The fee provided for in paragraph (1)(A) of this subsection may be waived by the Administrator, pursuant to regulations which the Administrator shall prescribe, on the basis of the party's inability to pay or for other good cause shown.

"(3) In the event of any objection filed under paragraph (1)(F) of this subsection, the Administrator shall, pursuant to regulations which the Administrator shall prescribe establishing standards consistent with standards for protective orders applicable in the United States District Courts, evaluate such objection and issue an order (A) directing that, within such period as the Administrator shall specify, the interrogatory or interrogatories objected to be answered as served or answered after modification, or (B) indicating that the interrogatory or interrogatories are no longer required to be answered.

"(4) If any person upon whom interrogatories are served under paragraph (1)(F) of this subsection fails to answer or fails to provide responsive answers to any such interrogatories within 30 days after service or such additional time as the Administrator may allow, the Administrator shall, upon a statement or showing by the party who served such interrogatories of general relevance and reasonable scope of the evidence sought, issue a subpena under section 3311 of this title (with enforcement of such subpena to be available under section 3313 of this title) for such person's appearance and testimony on such interrogatories at a deposition on written questions, at a location within 100 miles of where such person resides, is employed, or transacts business.

"(d) In the course of any hearing, investigation, or other proceeding in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration, an employee of the Veterans' Administration may at any time disqualify himself or herself, on the basis of personal bias or other cause, from adjudicating the claim. On the filing by a party in good faith of a timely and sufficient affidavit averring personal bias or other cause for disqualification on the part of such an employee,

the Administrator shall determine the matter as a part of the record and decision in the case.

"(e) The transcript or recording of testimony and the exhibits, together with all papers and requests filed in the proceeding, and the decision of the Board (1) shall constitute the exclusive record for decision in accordance with section 4004(a) of this title, (2) shall be available for inspection by any party to such proceeding, or such party's authorized representative, at reasonable times and places, and (3) on the payment of a fee prescribed under section 3302(b) of this title (not to exceed the direct cost of duplication), shall be copied for the claimant or such claimant's authorized representative within a reasonable time. Such fee may be waived by the Administrator, pursuant to regulations which the Administrator shall prescribe, on the basis of the party's inability to pay or for other good cause shown.

"(f) Notwithstanding section 4004(a) of this title, section 554(a) of title 5, or any other provision of law, adjudication and hearing procedures prescribed in this title and in regulations prescribed by the Administrator under this title for the purpose of administering veterans' benefits shall be exclusive with respect to hearings, investigations, and other proceedings in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration.

"§ 4011. Notice of procedural rights

"In the case of any disallowance, in whole or in part, of a claim for benefits under laws administered by the Veterans' Administration, the Administrator shall, at each procedural stage relating to the disposition of such a claim, beginning with disallowance after an initial review or determination, and including the furnishing of a statement of the case and the making of a final determination by the Board, provide to the claimant and such claimant's authorized representative, if any, written notice of the procedural rights of the claimant. Such notice shall be on such forms as the Administrator shall prescribe by regulation and shall include, in easily understandable language, with respect to proceedings before the Veterans' Administration, (1) descriptions of all subsequent procedural stages provided for by statute, regulation, or Veterans' Administration policy, (2) descriptions of all rights of the claimant expressly provided for in or pursuant to this chapter, of the claimant's rights to a hearing, to reconsideration, to appeal, and to representation, and of any specific procedures necessary to obtain the various forms of review available for consideration of the claim, and (3) such other information as the Administrator, as a matter of discretion, determines would be useful and practical to assist the claimant in obtaining full consideration of the claim.".

(b) The table of sections at the beginning of such chapter is amended by adding after the item relating to section 4009 the following new items:

"4010. Adjudication procedures.
"4011. Notice of procedural rights.".

SEC. 109. (a) In order to evaluate the feasibility and desirability of alternative methods of (1) assuring the resolution of claims before the Administrator of Veterans' Affairs for benefits under laws administered by the Veterans' Administration as promptly and efficiently as feasible following the filing of a notice of disagreement pursuant to section 4005 (as amended by section 106 of this Act) or 4005A of title 38, United States Code, and (2) affording claimants the opportunity for a hearing before or review by a disinterested authority at a location as convenient and on as timely basis as possible for each claimant, the Administrator is authorized to conduct a study, commencing not more than 1 year after the date of the enactment of this Act, for a period of 24 months, involving either or both of the alternative methods described in subsection (b) of this section for resolution of claims.

(b)(1) In not more than three geographic areas, the Administrator is authorized to provide an intermediate-level adjudication process whereby each claimant may, within the time afforded such claimant under paragraph (3) of section 4005(d) or 4005A(b) of title 38, United States Code, to file an appeal, request a de novo hearing at the agency of original jurisdiction (as described in section 4005(b)(1) of such title) before a panel of three Veterans' Administration employees, each of whose primary responsibilities include adjudicative functions but none of whom shall have previously considered the merits of the claim at issue. Following such hearing, such panel shall render a decision and prepare a new statement of the case in accordance with the requirements of paragraphs (1) and (2) of section 4005(d) of such title. Such new statement of the case shall, for all purposes relating to appeals under chapter 71 of such title, be considered to be a statement of the case as required by paragraph (1) of such section 4005(d).

(2) In not more than three other geographic areas, the Administrator is authorized to provide for an enhanced schedule of visits, on at least a quarterly basis each year, by a panel or panels of the Board of Veterans' Appeals to conduct formal recorded hearings pursuant to section 4002 of such title in such areas.

(c) Not later than 6 months after the completion of such study, the Administrator shall report to the Congress on the results thereof, including an evaluation of the cost factors associated with each alternative studied and with any appropriate further implementation thereof, the impact on the workload of each regional office involved in such study, and the impact on the annual caseload of the Board of Veterans' Appeals resulting from each alternative stud-

ied, together with any recommendations for administrative or legislative action, or both, as may be indicated by such results.

SEC. 110. Section 3010(i) is amended—

(1) by inserting "(1)" after "(i)"; and

(2) by adding at the end the following new paragraph:

"(2) Whenever any disallowed claim is reopened and thereafter allowed on the basis of new and material evidence in the form of official reports from the proper service department, the effective date of commencement of the benefits so awarded shall be the date on which an award of benefits under the disallowed claim would have been effective had the claim been allowed on the date it was disallowed.".

TITLE II—VETERANS' ADMINISTRATION RULE MAKING

SEC. 201. (a) Subchapter II of chapter 3 is amended by adding at the end the following new section:

"§ 223. Rule making

"Notwithstanding the provisions of subsection (a)(2) of section 553 of title 5, the promulgation of rules and regulations by the Administrator, other than rules or regulations pertaining to agency management or personnel or to public property or contracts, shall be subject to the requirements of section 553 of title 5.".

(b) The table of sections at the beginning of such chapter is amended by adding after the item relating to section 222 the following new item:

"223. Rule making.".

TITLE III—JUDICIAL REVIEW

SEC. 301. Section 211(a) is amended by striking out "sections 775, 784" and inserting in lieu thereof "sections 775 and 784 and subchapter II of chapter 71 of this title".

SEC. 302. (a) Chapter 71 is further amended—

(1) by inserting after the table of sections the following new heading:

"Subchapter I—General";

and

(2) by adding at the end thereof the following new subchapter:

"Subchapter II—Judicial Review

"§ 4025. Right of review; commencement of action

"(a) For the purposes of this chapter—

"(1) 'final decision of the Administrator' means—

"(A) a final determination of the Board of Veterans' Appeals pursuant to section 4004 (a) or (b) of this title; or

"(B) a dismissal of an appeal by the Board of Veterans' Appeals pursuant to section 4005 or 4008 of this title; and

"(2) 'claim for benefits' means—

"(A) an initial claim filed under section 3001 of this title;

"(B) a challenge to a decision of the Administrator reducing, suspending, or terminating benefits; or

"(C) any request by or on behalf of the claimant for reopening, reconsideration, or further consideration in a matter described in clause (A) or (B) of this paragraph.

"(b) Except as provided in subsection (f) of this section, after any final decision of the Administrator adverse to a claimant in a matter involving a claim for benefits under any law administered by the Veterans' Administration, such claimant may obtain a review of such decision in a civil action commenced within 180 days after notice of such decision is mailed to such claimant pursuant to section 4004(d) of this title. Such action shall be brought against the Administrator in the district court of the United States for the judicial district in which the plaintiff resides or the plaintiff's principal place of business is located, or in the district court of the United States for the judicial district where the principal offices of the Board of Veterans' Appeals (established under section 4001 of this title) are located.

"(c) The complaint initiating an action under subsection (a) of this section shall contain sufficient information to permit the Administrator to identify and locate the plaintiff's records in the custody or control of the Veterans' Administration.

"(d) Not later than 30 days after filing the answer to a complaint filed pursuant to subsection (a) of this section, the Administrator shall file a certified copy of the records upon which the decision complained of is based or, if the Administrator determines that the cost of filing copies of all such records is unduly expensive, the Administrator shall file a complete index of all documents, transcripts, or other materials comprising such records. After such index is filed and after considering requests from all parties, the court shall require the Administrator to file certified copies of such indexed items as the court considers relevant to its consideration of the case.

"(e) In an action brought pursuant to subsection (b) of this section, the court shall have the power, upon the pleadings and the records specified in subsection (d) of this section, to enter judgment in accordance with section 4026 of this title or remand the cause in accordance with such section or section 4027 of this title.

"(f)(1) No action may be brought under this section unless (A) the initial claim for benefits is filed pursuant to section 3001 of this title on or before the last day of the fifth fiscal year beginning after the effective date of this section, and (B) the complaint initiating such action is filed not more than 180 days after notice of the first final decision of the Administrator rendered after the last day of such fiscal year is mailed to the claimant pursuant to section 4004(d) of this title. If the case is reopened pursuant to section 4004(b)(2)(A) of this title within 180 days after such notice is mailed, the next final decision shall, for purposes of this subsection, be considered the first final decision of the Administrator.

"(2) No action may be brought under this section with respect to matters arising under chapters 19 and 37 of this title.

"§ 4026. Scope of review

"(a)(1) In any action brought under section 4025 of this title, the court, to the extent necessary to its decision and when presented, shall—

"(A) decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an action of the Administrator;

"(B) compel action of the Administrator unlawfully withheld;

"(C) hold unlawful and set aside decisions, findings (other than those described in clause (D) of this paragraph), and conclusions of the Administrator found to be—

"(i) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

"(ii) contrary to constitutional right, power, privilege, or immunity;

"(iii) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

"(iv) without observance of procedure required by law; and

"(D) in the case of a finding of material fact made in reaching a decision on a claim for benefits under laws administered by the Veterans' Administration, hold unlawful and set aside such finding when it is so utterly lacking in a rational basis in the evidence that a manifest and grievous injustice would result if such finding were not set aside.

"(2) Before setting aside any finding of fact under paragraph (1)(D) of this subsection, the court shall specify the deficiencies in the record upon which the court would set aside such finding and shall remand the case one time to the Administrator for further action not inconsistent with the order of the court in remanding the case. In remanding a case under the first sentence of this paragraph, the

court shall specify a reasonable period of time within which the Administrator shall complete the ordered action. If the Administrator does not complete action on the case within the specified period of time, the case shall be returned to the court for its further action.

"(b) In making the determinations under subsection (a) of this section, the whole record before the court pursuant to section 4025(d) of this title shall be subject to review, and the court shall review those parts of such record cited by a party, and due account shall be taken of the rule of prejudicial error.

"(c) In no event shall findings of fact made by the Administrator be subject to trial de novo by the court.

"(d) When a final decision of the Administrator is adverse to a party and the sole stated basis for such decision is the failure of such party to comply with any applicable regulation of the Veterans' Administration, the court shall review only questions raised as to compliance with and the validity of the regulation.

"§ 4027. Remands

"(a)(1) In any action brought under section 4025 of this title, the court shall, on motion of the Administrator made before the expiration of the time specified for the filing of an answer to a complaint filed pursuant to subsection (b) of such section, allow a single remand of a case to the Administrator for further review by the Administrator. If such review is not completed within 90 days after the date of such remand, the matter shall be returned to the court for its action.

"(2)(A) At any time after the Administrator files an answer, the court may, in the exercise of its discretion, remand the case to the Administrator for further action by the Administrator.

"(B) If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there is good cause for granting such leave, the court shall remand the case to the Administrator and order such additional evidence to be taken by the Administrator.

"(C) In the case of a remand under subparagraph (A) or (B) of this paragraph, the court may specify a reasonable period of time within which the Administrator shall complete the required action.

"(b) After a case is remanded to the Administrator under subsection (a) of this section, and after further action by the Administrator, including consideration of any additional evidence, the Administrator shall modify, supplement, affirm, or reverse the findings of fact or decision, or both, and shall file with the court any such modification, supplementation, affirmation, or reversal of the findings of fact or decision or both, as the case may be, and certified copies of any additional records and evidence

upon which such modification, supplementation, affirmation, or reversal was based. Any such modification, supplementation, affirmation, or reversal of the findings of fact or decision shall be reviewable by the court only to the extent provided in section 4026 of this title.

"§ 4028. Survival of actions

"Any action brought under section 4025 of this title shall survive notwithstanding any change in the person occupying the office of Administrator or any vacancy in such office.

"§ 4029. Appellate review

"The decisions of a district court pursuant to this chapter shall be subject to appellate review by the courts of appeals and the Supreme Court of the United States in the same manner as judgments in other civil actions.".

(b) The table of sections at the beginning of such chapter is amended—

(1) by inserting before the item relating to section 4001 the following new item:

"SUBCHAPTER I—GENERAL";

and

(2) by adding after the item (added by section 108(b) of this Act) relating to section 4011 the following new items:

"SUBCHAPTER II—JUDICIAL REVIEW

"4025. Right of review; commencement of action.
"4026. Scope of review.
"4027. Remands.
"4028. Survival of actions.
"4029. Appellate review.".

SEC. 303. Section 1346(d) of title 28, United States Code, is amended by inserting before the period at the end thereof a comma and "except as provided in subchapter II of chapter 71 of title 38".

TITLE IV—ATTORNEYS' FEES

SEC. 401. Section 3404 is amended by striking out subsection (c) and inserting in lieu thereof the following:

"(c) The Administrator shall approve reasonable attorneys' fees to be paid by the claimant to attorneys for representation before the Veterans' Administration in connection with a claim for benefits under laws administered by the Veterans' Administration, but in no event shall such attorneys' fees exceed—

"(1) for any claim resolved prior to or at the time that a final decision of the Administrator is first rendered, $10; or

"(2) for any claim resolved after such time—

"(A) if the claimant and an attorney have entered into an agreement under which no fee is payable to such attorney unless the claim is resolved in a manner favorable to the claimant, 25 percent of the total amount of any past-due benefits awarded on the basis of the claim; or

"(B) if the claimant and an attorney have not entered into such an agreement, the lesser of—

"(i) the fee agreed upon by the claimant and the attorney; or

"(ii) $500, or such greater amount as may be specified from time to time in regulations which the Administrator shall prescribe based on changed national economic conditions subsequent to the date of enactment of this subsection, except that the Administrator may, in the Administrator's discretion, determine and approve a fee in excess of $500, or such greater amount if so specified, in an individual case involving extraordinary circumstances warranting a higher fee.

"(d)(1) If, in an action brought under section 4025 of this title, the matter is resolved in a manner favorable to a claimant who was represented by an attorney, the court shall determine and allow a reasonable fee for such representation to be paid to the attorney by the claimant. When the claimant and an attorney have entered into an agreement under which the amount of the fee payable to such attorney is to be paid from any past-due benefits awarded on the basis of the claim and the amount of the fee is contingent on whether or not the matter is resolved in a manner favorable to the claimant, the fee so determined and allowed shall not exceed 25 percent of the total amount of any past-due benefits awarded on the basis of the claim.

"(2) If, in an action brought under section 4025 of this title, the matter is not resolved in a manner favorable to the claimant, the court, taking into consideration the likelihood at the time such action was filed that the claimant would prevail, may determine and allow a reasonable fee not in excess of $750 to be paid to the attorney by the claimant for the representation of such claimant.

"(e) To the extent that past-due benefits are awarded in proceedings before the Administrator or a court, the Administrator shall direct that payment of any attorneys' fee that has been determined and allowed under this section be made out of such past-due benefits, but in no event shall the Administrator withhold for the purpose of such payment any portion of benefits payable for a period subsequent to the date of the final decision of the Administrator or court making such award.

"(f) The provisions of this section shall apply only to cases involving claims for benefits under the laws administered by the Veterans' Administration, and such provi-

sions shall not apply in cases in which the Veterans' Administration is the plaintiff or in which other attorneys' fee statutes are applicable.

"(g) For the purposes of this section—

"(1) the terms 'final decision of the Administrator' and 'claim for benefits' shall have the same meaning provided for such terms, respectively, in section 4025 (a) of this title; and

"(2) claims shall be considered as resolved in a manner favorable to the claimant when all or any part of the relief sought is granted.

"(h) In an action brought under section 4025 of this title, the court may award to a prevailing party, other than the Administrator, reasonable attorneys' fees and costs in accordance with the provisions of subsection (d) of section 2412 of title 28, as in effect on the day before the effective date of the repeal of such subsection (as provided in section 204(c) of the Equal Access to Justice Act (Public Law 96-481; 94 Stat. 2329; 28 U.S.C. 2412 note)).".

SEC. 402. Section 3405 is amended—

(1) by striking out "or" after "title,"; and

(2) by striking out "him" and inserting in lieu thereof "such claimant or beneficiary, or (3) with intent to defraud, in any manner willfully and knowingly deceives, misleads, or threatens a claimant or beneficiary or prospective claimant or beneficiary under this title with reference to any matter covered by this title".

TITLE V—EFFECTIVE DATES

SEC. 501. This Act and the amendments made by this Act shall take effect on the first day of the first month beginning not less than 180 days after the date of enactment of this Act.

SEC. 502. A civil action authorized in subchapter II of chapter 71 of title 38, United States Code (as added by section 302(a) of this Act) may be instituted to review decisions of the Board of the Veterans' Appeals rendered on or after April 1, 1985.

INTRODUCTION

S. 367 the proposed "Veterans' Administration Adjudication Procedure and Judicial Review Act", was introduced on January 31, 1985, by Senator Gary Hart of Colorado, Senator Alan Cranston, Ranking Minority Member of the Committee, Senator Frank H. Murkowski, Chairman of the Committee, and 23 original cosponsors.

The introduction of S. 367 was one in a series of steps dating back to 1975, including the introduction of S. 3392 in the 94th Congress, the introduction of S. 364 in the 95th Congress and 5 days of hearings thereon, the development of a Committee substitute in December 1978, and the introduction of S. 330 in the 96th Congress. S. 330 was favorably reported by the Committee on May 3, 1979, by

a vote of 9–1, and was passed by the Senate by voice vote on September 17, 1979.

Again, in the 97th and 98th Congresses, the Committee and the Senate acted on such legislation.

S. 349 as introduced in the 97th Congress was identical to the Senate-passed version of S. 330. It was unanimously reported by the Committee, with an amendment in the nature of a substitute, on April 28, 1982, and was passed by the Senate by voice vote on September 14, 1982.

S. 636 as introduced in the 98th Congress was identical to the Senate-passed version of S. 349, with two exceptions: First, the deletion of title V, providing for a merit pay system exclusion for members of the Board of Veterans' Appeals—a matter which had been resolved administratively since the previous Committee action; and second, a 1-year delay in the effective date.

On April 20, 1983, the Committee unanimously voted to report favorably S. 636, with amendments, and it was passed by the Senate by voice vote on June 15, 1983.

S. 367 as introduced was identical to the Senate-passed version of S. 636, again with two exceptions: First, deletion of material from title I dealing with the size and membership of the Board of Veterans' Appeals, an issue that was resolved in Public Law 98–223; and second, a 2-year delay in the effective date.

Summary of S. 367 as Reported

SUMMARY OF PROVISIONS

The Committee bill has five titles: Adjudication procedures; Veterans' Administration rule making; Judicial review; Attorneys' fees; and Effective dates, as follows:

Title I: Adjudication procedures.—This title would codify and establish various internal procedures of the VA applicable in adjudications of claims for benefits under laws administered by the VA. Included in title I of the Committee bill are provisions that would:

1. Codify the burden of proof and reasonable doubt standards in VA claims adjudication proceedings, currently provided for by regulation (38 CFR 3.102 and 3.103), in order to assure that the VA's present practices of providing claimants all reasonable assistance in the development of claims and construing the evidence liberally in favor of the claimant are not lost in reaction to the provision, in title III of the Committee bill, authorizing judicial review of final decisions denying claims.
2. Specify procedures for the service of subpenas authorized under section 3311 of title 38, United States Code, including procedures for personal service or service by mail.
3. Encourage the BVA to dispose of appeals before it in a timely manner.
4. Preclude a temporary or acting member from casting a vote in any case where the votes of the two regular members are split.
5. Require the Chairman to report to the appropriate committees of the Congress annually on the Board's current and

future workload and its ability, based on then current and projected staffing, to dispose of appeals in a timely manner.

6. Require the BVA to provide a claimant with notice and an opportunity for a hearing before making a decision based on additional official information received after the BVA had previously decided the case.

7. Codify a claimant's right to an opportunity for a hearing before the BVA.

8. Require expressly that BVA decisions must be based exclusively on evidence and material of record and on applicable provisions of law.

9. Make a technical correction in the description of the BVA's authority to reopen a claim by deleting (as inconsistent with present practice) the present requirement that new and material evidence sufficient to reopen a claim be in the form of official reports from the proper service department.

10. Specify that a court decision upholding denial of a claim under title III of the Commitee bill, shall not diminish the Board's discretionary authority to reopen a claim.

11. Require the BVA to mail a detailed statement of its decision to the claimant and the claimant's authorized representative, if any, at the last known address of the claimant and such representative.

12. Expand the present requirement that BVA decisions be in writing and contain findings of fact and conclusions of law separately stated, to require that such decisions include findings and conclusions and reasons and bases therefor, on all material issues of fact, law, and matters of discretion, as well as an order granting or denying relief.

13. Expressly provide a claimant before the BVA with the right, upon request, to have the Board acquire an independent medical opinion when there is a substantial disagreement between the substantiated findings or opinions of two physicians on an issue material to the outcome of the case. Any Board decision to deny such a request, and the basis for such denial, would have to be provided to the claimant but such decision would not be subject to judicial review.

14. Authorize the Administrator to administer oaths and affirmations, examine witnesses and receive evidence in VA claims adjudication proceedings.

15. Provide for the admission, even if inadmissible under the rules of evidence applicable in court, of all evidence submitted in VA claims adjudication proceedings subject only to such provisions as the Administrator may impose through regulations for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.

16. Provide that, in the course of hearings on a claim for VA benefits following initial denial of the claim, the claimant (or other party) shall have the right to review and, on the payment of a fee (waivable, pursuant to regulations that the Administrator must prescribe, on the basis of inability to pay or for other good cause shown) limited to the costs of duplication, to obtain copies of the case files and all materials to be used by the VA at the hearing, to present witnesses and evidence in-

cluding medical opinions and rebuttal evidence, to make argument and to submit written contentions, and to submit to any person written interrogatories which must be answered unless written objections thereto are filed. If the person served with interrogatories files an objection thereto, the Administrator must, pursuant to regulations that the Administrator must prescribe, evaluate the objection and issue an order directing that answers be given or stating that they need not be given. If the person served with interrogatories fails to comply with such an order or, in the absence of an objection, to answer the interrogatories, the party who served the interrogatories would have the right, upon a statement or showing of good cause, to have the Administrator issue a subpena (enforceable in Federal district court) for the witness' attendance at a deposition at which the unanswered interrogatories would be asked.

17. Allow, in the course of any claims proceeding, any VA employee to disqualify himself or herself on the basis of personal bias or other cause and a party to challenge such an employee on such basis.

18. Specify the materials that must be included in the record of VA claims adjudication proceedings and provide that the record shall be available for the claimant's inspection and shall be copied for the claimant upon the payment of a fee (waivable, pursuant to regulations that the Administrator must prescribe, on the basis of claimant's inability to pay or for other good cause shown) limited to the cost of duplication.

19. Specify that the adjudication rights contained in title 38 and prescribed thereunder by the Administrator are exclusive.

20. Require the Administrator, at each stage of claims adjudication proceedings before the VA, to provide the claimant with detailed notice, in easily understandable language, of the claimant's procedural rights.

21. Authorize a VA study of alternative methods of ensuring the prompt and efficient resolution of claims and affording claimants the opportunity for a timely and convenient hearing or review by a disinterested authority. Under this provision, the Administrator could study the following two alternative methods of speeding claims resolution at locations convenient to claimants: (A) intermediate review panels which would conduct *de novo* reviews at VA regional offices prior to appeal to the BVA, and (B) an enhanced schedule of BVA traveling board visits (at least four per year). The report on the study, including the Administrator's recommendations for administrative or legislative actions, or both, would be due to be submitted to the Congress within 6 months after completion of the study.

22. Permit retroactive awards for claims reopened and allowed on the basis of new and material evidence in the form of service records.

Title II: Veterans' Administration rule making.—This title would require application of the rule making provisions of the Administrative Procedure Act (APA) to all matters other than those involving agency management, personnel, public property or contracts. Matters such as those involving VA benefits and loans would thus

be made subject to certain APA requirements, including requirements of notice to the public of proposed regulations and opportunity for comment on such proposed regulations, notwithstanding the exclusion from such provisions in section 553(a)(2) of title 5, United States Code, of matters involving loans, grants, benefits, or contracts.

Title III: Judicial review.—This title would permit access to the United States Federal court system for review of decisions of the Administrator on claims for benefits. Included in title III of the Committee bill are provisions that would:

1. Expand the present category of exceptions to the general preclusion of judicial review contained in present section 211(a) of title 38, United States Code.

2. Authorize review of a final decision of the Administrator adverse to a VA benefits claimant in Federal district court (in either the plaintiff's home district or the judicial district where the Board of Veterans' Appeals is located, presently the District of Columbia) instituted by a civil action brought within 180 days of the mailing by the VA of notice of such decision.

3. Define a "final decision of the Administrator", which may be appealed to Federal court, to include a Board of Veterans' Appeals (BVA) final decision on the merits, refusal to reopen a claim, and dismissal of an appeal.

4. Define "claim for benefits" to include not just initial claims, but also subsequent action taken on a claim such as reduction or termination of benefits.

5. Require that a complaint instituting a civil action for court review of a decision relating to a claim for benefits include sufficient information to permit the VA to identify and locate the plaintiff's VA records.

6. Require the VA to file, together with its answer to a complaint, a certified copy of all of the materials that constitute the record or, if the cost of filing all such materials would be unduly expensive, a complete index of all of the materials. In the latter case, the court would, after considering the requests of the parties, order the Administrator to file certified copies of such indexed items as it deemed relevant to its consideration of the case.

7. Authorize a court, in an action for review of a VA denial of a claim for benefits, to enter a judgment on the pleadings and the records.

8. Preclude judicial review, under the provisions added by this title of the Committee bill, unless the initial claim is filed with the Administrator on or before the last day of the fifth fiscal year beginning after the effective date of such provisions and the appeal to Federal district court is filed within 180 days of the first BVA decision adverse to the claimant, as well as with respect to matters arising under chapters 19 (insurance) and 37 (home, condominium, and mobile home loans) of title 38, United States Code.

9. Authorize the reviewing court to decide all relevant questions of law; to interpret constitutional and statutory provisions as well as other actions of the Administrator, compel action of the Administrator unlawfully withheld; and to hold

unlawful and set aside decisions, findings, and conclusions of the Administrator found to be (A) arbitrary, capricious, an abuse of discretion, or not in accordance with law, (B) contrary to constitutional right, power, privilege, or immunity, (C) in excess of statutory jurisdiction, authority, or limitation, or in violation of a statutory right, or (D) without observance of procedure required by law, or (E) in the case of a finding of material fact, so utterly lacking in a rational evidentiary basis that a manifest and grievous injustice would result if the finding were not set aside.

10. Require a reviewing court, before reversing an Administrator's decision on the basis of the court's finding that a factual determination of the Administrator is utterly lacking in a rational evidentiary basis, to specify where it finds the record deficient and remand the matter a single time to the Administrator for further action within a reasonable, specified period of time.

11. Require a court, in making determinations, to review those parts of the administrative record cited by a party and to take due account of the rule of prejudical error.

12. Preclude a reviewing court from conducting a trial *de novo* on the Administrator's findings of fact.

13. Provide that, in a matter resolved by the VA solely on the basis of a party's failure to comply with a VA regulation, the reviewing court may consider only issues raised as to the validity of or a party's compliance with the regulation.

14. Authorize three different types of remands from the reviewing court to the Administrator: First, a single remand for not more than 90 days, at the Administrator's request before the Administrator files an answer, for the Administrator to reconsider the case; second, a remand in the court's discretion after the Administrator has filed an answer; and third, a remand if either party applies for leave to adduce further evidence and the moving party shows "good cause" for the requested remand.

15. Provide that any actions brought under the judicial review provisions added by this title of the Committee bill will survive the tenure of any individual as Administrator.

16. Provide that decisions of the district court pursuant to the judicial review provisions added by this title shall be subject to review in higher Federal courts in the same manner as judgments in other civil actions.

17. Specify that the current-law limitation on the jurisdiction of Federal district courts in matters involving pensions shall not apply to VA pension matters.

Title IV: Attorneys' fees.—This title would revise the present title 38 limitation of $10 for claimants' attorneys' fees by authorizing reasonable attorneys' fees, within certain limits, for representation of individuals before the VA and for representation in a case appealed to court under the judicial review provisions added to title 38 by this title of the Committee bill, with a specified limitation in cases in which the matter is resolved in a manner unfavorable to the claimant. Included in title IV are provisions that would:

1. Retain the $10 limitation on the amount an attorney may receive for services rendered prior to a final BVA decision, while removing an ambiguity with respect to whether that limitation applies under current law to attorneys "recognized" for practice before the VA.

2. Permit the Administrator to approve a reasonable attorney's fee for representation within the VA after a final BVA decision (where, for example, a case remains before the VA for reconsideration or for reopening on the basis of "new and material evidence" offered under section 4004(b) of title 38, United States Code, as amended by title I of the Committee bill), up to a maximum of $500 or, if the claimant and attorney have entered into a contingency-fee agreement, no more than 25 percent of any past-due benefits awarded the claimant.

3. Authorize the Administrator to increase the $500 maximum limitation in future years to reflect changed economic conditions.

4. Authorize the Administrator to disregard the $500 limitation in an individual case involving extraordinary circumstances warranting a higher fee.

5. Allow a reviewing court, in a case appealed from the VA, to approve a reasonable attorneys' fee. For cases not resolved in a manner favorable to a claimant, the maximum a court could approve would be $750. For cases resolved in a manner favorable to a claimant, the only limitation on the amount of the fee that a court could approve would be that it must be reasonable, or that, if a claimant and an attorney had entered into a contingent-fee agreement, the fee approved by the court could not exceed 25 percent of the total amount of past-due benefits.

6. Authorize the VA to make payment to an attorney from past-due benefits, but preclude the VA from making payments from benefits received subsequent to the date of the decision entitling the veteran to benefits.

7. Limit the applicability of the attorneys' fee provisions to cases involving claims for benefits.

8. Define, for the purpose of attorneys' fees provisions, a claim as being "resolved in a manner favorable to the claimant" when any or all of the relief sought is granted.

9. Authorize a court to award to a prevailing party, other than the Administrator, reasonable attorneys' fees and costs in accordance with the provisions of the Equal Access to Justice Act, as in effect on the day before the effective date of the repeal of the subsection, under which such an award may be made unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

10. Provide criminal penalties for willfully and intentionally defrauding a VA claimant.

Title V: Effective dates.—This title provides for an effective date and authorizes the institution of civil actions, under the judicial review provisions added by title III of the Committee bill, for the review of certain Board of Veterans' Appeals (BVA) decisions prior

to such effective date. Included in this title are provisions that would:

1. Provide that the provisions added by the Committee bill would become effective 180 days after the date of enactment.
2. Allow for court review of a BVA decision rendered on or after April 1, 1985.

Discussion

Inasmuch as S. 367 as reported is substantially identical in all major substantive respects to S. 349 and S. 636 as reported in the 97th and 98th Congresses, the sections of Basic Purpose and Discussion of the Committee Report on S. 349 (S. Rept. No. 97-466, 97th Cong., 2d Sess.), are incorporated by specific reference as if fully set forth herein, to the extent not inconsistent with materials set forth in this report. There are, however, two matters—one relating to the judicial review issue and one relating to the attorney's fee issue—which the Committee feels merits further discussion.

Availability of Judicial Review of Veterans' Administration Action on Regulations

In the Committee report accompanying S. 349, the Committee addressed the issue of whether section 211(a) of title 38, United States Code, the provision of law which bars court review of certain Veterans' Administration decisions, acts as a bar to review of VA actions that do not involve individual claims for benefits but only regulations. The Committee, expressing the view that section 211(a) did not bar such court review, noted that

> most Federal courts of appeals that have addressed the question have held that section 211(a) does not preclude judicial review on the issue of whether a particular VA regulation was promulgated in excess of the Administrator's statutory authority. (S. Rept. No. 97-466, 97th Cong., 2d Sess., at p. 37.)

However, the Committee also noted that this result was not uniform among the courts of appeals and was not settled since the VA and the Department of Justice have continued the practice of "raising the section 211(a) bar in cases where no individual adjudications are involved", id. at 40. Thus the Committee noted that its reasons for supporting S. 349 included its view that

> VA claimants in all parts of the country should have uniform access to the judicial system rather than having to litigate before various district courts and appellate court panels the questions of whether and to what extent section 211(a) operates as a bar in a particular case. Id.

More recently, on October 4, 1984, during Senate debate on the legislation that was ultimately enacted as Public Law 98-542, the Veterans' Dioxin and Radiation Exposure Compensation Standards Act, various members of the Committee again expressed the view that the then-existing case law provided for access to court review to challenge VA actions in issuing regulations (see Cong. Rec., daily ed. October 4, 1984, at S13591 (statement of then-Chairman Alan

Simpson); at S13598-600 (statement of Ranking Minority Member Alan Cranston, including insertion into the Record of a memorandum by the American Law Division of the Congressional Research Service of the Library of Congress reviewing the case law); S13608 (statement of Senator Arlen Specter); S13609 (statement of Senator Spark Matsunaga); and S13610 (statement of Senator George Mitchell). During this debate, Senator Cranston also noted that "it is the VA's position under the current Administration that court review of VA regulations is available."

This position was first articulated by Administrator Walters in an answer to a question posed in connection with his confirmation hearing by Senator Cranston. In December 1983, Mr. Walters then stated:

> Should the VA promulgate regulations in excess of lawful authority Federal court action is certainly available to the adversely affected veterans.

Administrator Walters repeated this position in an April 10, 1984, letter which provided the agency's views on S. 1651. He then took note of:

> The body of case law permitting judicial review of constitutional challenges to agency regulations and procedures and allegations that the agency exceeded statutory authority in the promulgation of regulations.

Against this support for the proposition that section 211(a) does not bar court review of VA actions relating to regulations, the Committee notes the recent 2-to-1 decision of a 3-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit in the case of *Gott* v. *Walters* (No. 82-1159, March 22, 1985). That case involved a challenge to the propriety of the VA's issuance of and reliance upon certain documents relating to the resolution of claims based on exposure to ionizing radiation. Even though the Department of Justice did not raise the section 211(a) bar as an issue on appeal, the Court of Appeals did so on its own initiative and reversed the trial court (which had held that such review was available), expressly disagreed with a line of cases from the other courts of appeals, and held that section 211(a) bars review of decisions of the Administrator of Veterans' Affairs relating to regulations—indeed bars challenges to the propriety of the process by which regulations were issued—implementing veterans' benefits statutes.

The Committee makes note of the *Gott* opinion in this report to highlight the further ambiguity this decision creates in the state of the case law confronting a veteran who believes that the VA has acted in an unlawful manner. *Gott* v. *Walters* is a timely demonstration of the importance of clarifying the current confused state of the law regarding judicial review of VA actions, as the Committee bill would do. Also, because the Federal courts in the District of Columbia have traditionally had a particularly significant role in resolving cases involving administrative law issues, veterans and others seeking to challenge VA actions on regulations will be denied a significant avenue of redress as long as the *Gott* decision

remains the Federal law in the D.C. Circuit. This is, therefore, another reason for the Committee's action on this measure.

ATTORNEYS' FEES FOR REPRESENTATION OF VA CLAIMANTS

On June 28, 1985, the Supreme Court decided a case, *Walters* v. *National Association of Radiation Survivors* (No. 84-571) (hereinafter referred to as *"NARS"*), in which three veterans seeking service-connected-disability compensation, a veteran's surviving spouse seeking dependency and indemnity compensation (DIC) (based on a claim that the veteran died from a service-connected disability), and two organizations (the National Association of Radiation Survivors and Swords to Plowshares Veterans Right Organization) challenged the constitutionality of the provisions of section 3404(c) of title 38 limiting to $10 the fee that an attorney may receive for representing an individual with respect to a claim for VA benefits.

The United States District Court for the Northern District of California had determined prior to the conduct of a trial that it was likely that the plaintiffs would prevail with respect to their claim that the fee limitation violated the due process requirements of the Fifth Amendment and VA claimants' rights to freedom of speech under the First Amendment. *National Association of Radiation Survivors* v. *Walters*, 589 F. Supp. 1302 (1984). On that basis, the District Court granted a nationwide preliminary injunction against the enforcement of section 3404(c).

The Supreme Court voted 6-to-3 to reverse the District Court's grant of a preliminary injunction, and the case was returned to the lower court for a full evidentiary hearing and decision directly on the merits of the claim that the fee limitation is unconstitutional.

The decision and opinions handed down by the Supreme Court in that case raise certain issues relating to the Committee bill provisions modifying section 3404 on which the Committee wishes to comment.

First, the Committee notes that 2 of the 6 Justices who voted to overturn the District Court's injunction made clear their view that the Supreme Court's decision was not a ruling on the merits of the constitutional challenge. Rather, Justice O'Connor and Justice Blackmun, who joined Justice O'Connor in her concurring opinion, stated their view that the Supreme Court decided that the District Court's pre-trial issuance of a nationwide, preliminary injunction was an abuse of discretion. (Slip opinion, page 1.)

Thus, despite certain language in the majority opinion that might be read as expressing a firm conclusion that section 3404(c) is constitutional, a majority of the justices (the 2 concurring justices and the 3 dissenters) declined to take such a position. Justice Brennan made this point in his dissenting opinion. (Slip opinion, page 18, footnote 37.)

The decision in this case, therefore, does not remove the cloud that has been cast regarding the constitutional validity of section 3404(c), and the Committee believes that the existence of this continuing controversy underscores the need for Congressional action to modify the fee limitation. The courts can only strike the provision down or sustain it. They do not have the authority to make the type of adjustments that the Committee is recommending, which

would, the Committee believes, both reflect sound policy judgments and eliminate questions regarding constitutional validity.

Second, the Committee notes that both the District Court and the Supreme Court have thus far dealt only with the question of the per se, or facial, constitutionality of the fee limitation. The District Court temporarily enjoined its enforcement nationwide in all cases and the Supreme Court reversed the District Court's action. However, the plaintiffs also asserted—and neither court ruled on the assertion—that, even if the statute is held to be constitutionally valid on its face, it is unconstitutional as applied in the individual plaintiffs' cases.

In the Committee's view, the possibility that judicial decisions might uphold the fee limitation as not facially unconstitutional but leave it subject to challenges asserting that it is unconstitutional as applied in individual cases also underscores the need for legislation to eliminate constitutional issues and make the statute more appropriate and more fair to veterans in the contemporary context. For example, if "as applied" challenges were permissible despite a final, authoritative ruling that the statute is facially constitutional, there would be very real, undesirable barriers to veterans' ability to retain counsel in those cases in which a court ultimately might decide that the fee limitation is unconstitutional as applied. For an attorney to take such a case would mean risking the possibility of receiving no fee, even if the benefit in question is awarded. Moreover, the attorney would apparently have to make any fee of more than $10 contingent upon a judicial determination that the limitation was unconstitutional as applied and would have to resort to the potentially time-consuming and costly process of bringing suit in the Federal courts to obtain a ruling that the fee limit would be unconstitutional if applied in that case.

Such an extremely unwieldy, costly, and, very likely, often unsuccessful approach to protecting the veterans' constitutional right to legal representation would, in the Committee's view, be totally unsatisfactory in most cases.

Third, the Committee notes that the *NARS* case involved only two types of VA benefits—disability compensation paid to veterans with service-connected disabilities and DIC payable to the surviving spouses of those who die from service-connected causes—neither of which is need-based, as are certain welfare payments. The Supreme Court seemed to have attached considerable significance to this point. The Court noted that in the case of *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), it had held that, in a case involving non-means-tested Social Security benefits, no evidentiary hearing is constitutionally required prior to a temporary deprivation of benefits—but that, in the case of *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), the Court had ruled that a welfare recipient faced with possible termination of benefits was entitled to be represented by an attorney. Choosing which was more applicable to the fee limitation in context of compensation and DIC, the Court stated:

> We think that *the benefits at stake in VA proceedings, which are not granted on the basis of need*, are more akin to the social security benefits involved in *Mathews* than they are to the welfare payments upon which the recipi-

> ents in *Goldberg* depended for their daily subsistence. Just as this factor was dispositive in *Mathews* in the Court's determination that no evidentiary hearing was required prior to a temporary deprivation of benefits, 424 U.S., at 342–343, *so we think it is here determinative of the right to employ counsel.* (Emphasis added; slip opinion, page 27.)

The Court took no note of the fact that VA pension under chapter 15 of title 38—payable to certain needy, non-service-connected totally disabled (or elderly) wartime veterans, and to needy survivors of wartime veterans—is, to use the Court's words, "granted on the basis of need" and that recipients of pension depend on it "for their daily subsistance".

From this part of the opinion, it appears that the Court might well consider a different result if the constitutionality of the fee limitation is challenged in a VA pension case.

The Committee wishes to note that compensation and DIC are a top priority of the Committee and that it would consider anomalous any set of circumstances in which applicants for and recipients of those service-connected benefits are afforded less in the way of procedural protections or advantages—such as the right to be represented by counsel—than are applicants for and recipients of non-service-connected benefits, such as VA pension.

Fourth, although the Committee is not here undertaking any point-by-point rebuttal of possible areas of disagreement with the Court's opinion, the Committee does wish to correct a misimpression set forth in footnote 10 (slip opinion, page 16). In that note, the Court correctly pointed out that S. 349, as reported by this Committee and passed by the Senate in the 97th Congress, would have provided—as would the Committee bill provide—for limited judicial review of certain VA decisions and for retention of the fee limitation for VA claims adjudications up to and including the first denial of a claim by the Board of Veterans' Appeals. However, the Court then erroneously asserted that this *"Committee explained that the limitation was retained* 'to protect claimant's benefits,' and *because until judicial review was contemplated there was 'no need' for attorneys.* S. Rep. No. 97–466, p. 50 (1982)." (Emphasis added.)

The Committee notes that it has never recommended retention of the fee limitation for the reason that there is no need for attorneys until judicial review is contemplated. The words "no need", quoted by the Court, were used in only one place on the page cited by the Court, in the following sentence: "In light of the availability of national service officers and other nonlegal forms of free assistance, there would seem to be *no need for the assistance of an attorney in order to initiate the claims process* by completing and filing an application."

As the Committee noted in the ensuing discussion, it did—and still does—see a need for lifting the fee limit "once the BVA renders a decision adverse to the claimant on the merits", and that need is not limited to representation in judicial proceedings. Rather, as noted, the need may exist "with respect to such issues as seeking a reopening and reconsideration". In the following pages (pages 51–54) of that report, the Committee discussed at length (in material herein incorporated by reference) provisions allowing rea-

sonable attorneys' fees for representation within the VA following an initial BVA denial of a claim, regardless of whether the case ever reaches court.

Cost Estimate

In compliance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate, the Committee, based on information supplied by the Congressional Budget Office, estimates that the costs resulting from the enactment of the Committee bill during the first 5 years following enactment would be $2 million in fiscal year 1986; $3 million in fiscal year 1987; $3 million in fiscal year 1988; $4 million in fiscal year 1989; and $4 million in fiscal year 1990. A detailed breakdown of the costs, as estimated by CBO, over the 5-year period follows:

CONGRESSIONAL BUDGET OFFICE

COST ESTIMATE

June 12, 1985

1. BILL NUMBER: S. 367

2. BILL TITLE:

Veterans Administration Adjudication Procedure and Judicial Review Act.

3. BILL STATUS:

As ordered reported by the Senate Committee on Veterans' Affairs, June 12, 1985.

4. BILL PURPOSE:

To establish certain procedures for the adjudication of claims for benefits under laws administered by the Veterans Administration (VA), to provide for judicial review of certain final decisions of the Administrator of Veterans Affairs, and for other purposes.

5. ESTIMATED COST TO THE FEDERAL GOVERNMENT:

(by fiscal years, in millions of dollars)

	1986	1987	1988	1989	1990
Estimated Authorization Level	2	3	3	4	4
Estimated Outlays	2	3	3	4	4

The cost of this bill would fall in budget function 700.

Basis for Estimate

The cost of this bill would be generated by Title III, which would authorize access to the federal court system for veterans and their survivors to appeal disputed decisions of the VA's Board of Veterans Appeals (BVA). This provision would impact the workload of the BVA, the Department of Veterans Benefits, and the Office of the General Counsel in the VA and would add to the caseload of the federal district and circuit courts.

The BVA was recently expanded from 50 members to 65 members, with a corresponding increase in staff of 84 positions. Since the rapid increase in appeals experienced in 1981 and 1982 appears to have leveled off, it is expected that the newly increased staff of the BVA should be able to accommodate the workload generated by this provision without further growth.

The additions to the staffing of the Department of Veterans Benefits (DVB) necessary to handle the processing of remands from the courts would be small, only about 10 full-time equivalent employees (FTEE), costing only around $400,000 a year.

The General Counsel's office would be affected more than any other in VA by this provision since its staff would be required to litigate the appeals. It is estimated that an additional 82 FTEE would be needed at a cost of more than $3 million a year.

The Bankruptcy Amendments and Federal Judgeship Act of 1984, P.L. 98-353, authorized 85 new federal judgeships. The Administration has requested a supplemental appropriation for fiscal year 1985 to fill 23 of the new judgeships. It is expected that this expansion should be sufficient to handle the influx of veterans' benefit cases into the federal court system. If additional judgeships are required in excess of the increase currently planned by the Administration, the cost per new judgeship would be approximately $400,000 a year.

The above estimates are based on the following assumptions and methodologies:

- It was assumed, based on a BVA estimate, that the rate at which cases are denied by the BVA would drop from its present level of 70 percent to about 60 percent with the use of independent medical opinions and precedent decisions.

- It was assumed that 15 percent of cases denied by the BVA would be appealed. The Social Security Administration (SSA) has experienced an appeal rate of approximately 20 percent of denials. It is expected that VA claims would show a lower appeal rate because, unlike SSA, the VA resolves issues in which the evidence is equally balanced in favor of the claimant.

- It was assumed that 30 percent of the appealed cases would be remanded for further action and development, based on SSA experience.

- It was assumed that full steady-state operation and staffing levels would not be reached until 1987.

- All personnel costs were inflated by the CBO projection of federal pay raises.

- Non-salary personnel benefit costs were assumed to be 30 percent of salary costs.

- All other operating costs were increased in the outyears by the CBO projection of the GNP deflator.

The expansion of the appeals process for VA benefit decisions would probably result in some new awards that would not otherwise have been approved. While it is not possible to estimate with any precision the benefit costs of the new awards, it is not expected to be significant.

6. ESTIMATED COST TO STATE AND LOCAL GOVERNMENTS:

The Congressional Budget Office has determined that the budgets of state and local governments would not be directly affected by the enactment of this bill.

7. ESTIMATE COMPARISON: None.

8. PREVIOUS CBO ESTIMATE: None.

9. ESTIMATE PREPARED BY: K.W. Shepherd (226-2820).

10. ESTIMATE APPROVED BY:

James L. Blum
Assistant Director
for Budget Analysis

REGULATORY IMPACT STATEMENT

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee on Veterans' Affairs has made an evaluation of the regulatory impact which would be incurred in carrying out the Committee bill. The results of that evaluation are described below.

S. 367 as reported has five titles: I—Adjudication procedures; II—Veterans' Administration rule making; III—Judicial review; IV—Attorneys' fees; and V—Effective dates.

A. *Estimates of the number of individuals and businesses who would be regulated, and a determination of the groups and classes of such individuals and businesses:*

Title I.—Title I would codify internal adjudications procedures with respect to VA benefits within the VA for the purpose of providing statutory procedural protections for claimants while maintaining the informality that characterizes VA proceedings at present; would provide for the development of an administrative record in claims adjudications that will enable a reviewing court to understand and evaluate the proceedings in a particular case; and would enhance the agency's ability to carry out its mission after provision is made for judicial review of agency decisions. This title will not result in any regulation of individuals or businesses.

Title II.—Title II would require the VA's rulemaking procedures to be in accord with the relevant provisions in the Administrative Procedure Act. This means that the VA regulations would be required to be promulgated in accordance with the requirements of section 553 of title 5, United States Code, which includes requirements relating to public notice and opportunity for comment in the rulemaking process. The VA states that it has been in voluntary compliance with these requirements for a number of years. This title will not result in the regulation of any individuals or businesses.

Title III.—Title III provides access to the Federal court system for review of VA decisions. No individuals or businesses will be regulated.

Title IV.—Title IV revises the present limitation of $10 contained in title 38, United States Code, on the amount an attorney may receive for representing an individual with a claim for benefits under laws administered by the VA by providing for the approval by the Administrator of limited attorneys' fees, for representation of individuals before the VA, and for court approval of fees for the representation of such claimants in court proceedings authorized by the new judicial review provisions added to title 38 by title III of the Committee bill. Attorneys representing claimants before the VA would be permitted to receive more than $10 only after a claim had been denied by the BVA; at that point, it would be a matter of right if there were new and material evidence presented in support of the claim, and a matter of discretion with the Administrator if the claimant were to demonstrate good cause for the reopening of the claim. It is not possible to predict with any certainty the numbers of claimants who will retain attorneys to represent them in such subsequent proceedings before the BVA or in the Federal courts. The Committee anticipates that the system of veteran serv-

ice officer representation (free representation provided by employees of various veterans' groups and other organizations) will remain a very strong and vital force and, as a result, most claimants will not retain private attorneys in VA proceedings.

Title V.—Title V contains an effective date provision and authorizes court review of final VA decisions rendered on or after April 1, 1985. Nothing in this title will result in the regulation of any individuals or businesses.

B. *Determination of the economic impact of such regulations on individuals, consumers and businesses affected:*

Title I through V.—No significant economic impact on claimants before the VA (the "consumer" of VA adjudication procedures and judicial review) is expected to result from regulations under these titles.

C. *Determination of the impact of the personal privacy of individuals affected:*

Title I.—There would be no significant impact on the personal privacy of individuals affected by this title beyond any loss of privacy ordinarily entailed in claiming VA benefits.

Title II.—This title would have no impact on the personal privacy of any individuals.

Title III.—There would be no significant impact on the personal privacy of individuals affected by this title beyond any loss of privacy ordinarily entailed in pursuing a civil remedy in Federal court for the denial of a Federal benefit.

Title IV.—There would be no significant impact on the personal privacy of individuals affected by this title. Individual attorneys would be required to provide justification for fees claimed in conjunction with representing individuals, but such a requirement is in accord with the normal practice in cases in which agency or court approval of a fee award is required.

Title V.—There would be no significant impact on the personal privacy of individuals affected by this title.

D. *Determination of the amount of additional paperwork that will result from regulations to be promulgated under the bill:*

Title I.—Regulations to be promulgated under this title will generate little or no additional paperwork beyond that ordinarily involved in VA claims adjudication processes. However, additional paperwork will be required of the VA in the form of an annual report on certain aspects of Board of Veterans' Appeals operations from the Chairman of the Board to the Congress by December 31, 1986, and annually thereafter; a report following a discretionary study of alternative methods of speeding claims resolutions at locations convenient to claimants' residences; and in the form of ruling on requests for additional independent medical opinions and the opinions themselves.

Title II.—Since the VA has generally been in voluntary compliance for a number of years with the procedures added to title 38 by this title, mandating such compliance should result in no additional paperwork.

Title III.—The authorizations in this title for judicial review in Federal courts should not result in the promulgation of any additional regulations. However, it is anticipated that this access to court review will result in a significant increase in internal VA pa-

perwork as files are prepared for courts and cases are defended in court.

Title IV.—Pursuant to this title, the Administrator will be required to either approve or deny attorneys' fees for representation of claimants before the VA, resulting in additional paperwork in the form of applications from attorneys and decisions thereon regarding approval of fees. Although all attorneys who represent claimants in matters resolved within the VA will submit such paperwork, it is not anticipated that this requirement will constitute an undue burden on any individual attorney, nor should the paper work result in significant management problems for the agency.

Title V.—It is not anticipated that any regulations will be promulgated under this title.

Section-by-Section Analysis of S. 367 as Reported

Section 1

Subsection (a) of section 1 provides that this Act may be cited as the "Veterans' Administration Adjudication Procedure and Judicial Review Act".

Subsection (b) of section 1 provides that, except when otherwise expressly provided, reference to a section or other provision shall be considered to be made to a section or other provisions of title 38, United States Code, relating to veterans' benefits.

TITLE I—ADJUDICATION PROCEDURES

Section 101

Subsection (a) of section 101 would amend chapter 51 of title 38, United States Code, relating to applications for, the effective dates of, and the method of payment of veterans' benefits, to add a new section 3007 codifying, for VA adjudication purposes, the burden of proof and reasonable doubt standards currently provided for by VA regulation (38 CFR 3.102) and the requirement, also in VA regulations, that the VA assist a claimant in developing facts in connection with a claim (38 CFR 3.103). These provisions would be codified in order to ensure that the VA's present practices of making every reasonable effort to assist a claimant and construing the evidence favorably to the claimant are not abandoned in response to the provisions of title III of the bill proposing to amend title 38 to authorize court review. The new section 3007 would provide as follows:

New Section 3007.—Burden of Proof; benefit of the doubt.

Subsection (a) of new section 3007: Would provide that, except when otherwise provided by the Administrator in accordance with provisions of title 38, a claimant would have the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that a claim is well grounded and would provide that the Administrator shall assist a claimant in developing pertinent facts. Thus, as presently provided for in VA regulations (38 CFR 3.102), the initial burden of going forward with evidence to establish all elements of a claim would be on the claimant. This subsection would not affect existing statutory or regulatory procedures that specify different procedures relating to burden of proof (for example, the statutory presumptions relating to certain diseases in

section 312 of title 38, United States Code, pursuant to which certain such diseases are considered service connected without a showing that the particular disease existed during active duty service if it became manifest within a specified period after the individual's discharge from such service). In addition, this subsection would codify the obligation of the VA (presently imposed by regulation set forth at 38 CFR 3.103) to provide complete assistance to the veteran or other claimant in the development of a claim.

Subsection (b) of new section 3007: Would provide, without shifting the burden specified in subsection (a) of this section, that, if, after a review of all of the evidence in a case, there is an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of the claim, the VA is to give the claimant the benefit of the doubt on each such issue, thus resolving the issue in favor of the claimant. This provision is derived from an existing VA regulation (38 CFR 3.102) but the rules are simplified and the phrase "benefit of the doubt," is used in lieu of the phrase "reasonable doubt" in order to avoid confusion with the meaning of the latter phrase in the criminal law context.

Paragraph (1) of subsection (b) of section 101 would amend the table of chapters at the beginning of title 38, United States Code, and the table of chapters at the beginning of part IV of such title, relating to general administrative provisions, to strike, in the item relating to chapter 51, "Applications" and insert in lieu thereof "Claims" in order to reflect the change made in that chapter heading by paragraph (2) of this subsection.

Paragraph (2) of subsection (b) of section 101 would amend the heading of chapter 51 to read "Chapter 51—Claims, Effective Dates, and Payments" in lieu of "Applications, Effective Dates, and Payments" in order to indicate more accurately the subject matter of that chapter.

Paragraph (1) of subsection (c) of section 101 would amend the table of sections at the beginning of chapter 51 of title 38, United States Code, relating to claims, effective dates, and payments, to strike, in the item relating to subchapter I, "Applications" and insert in lieu thereof "Claims" in order to reflect the change made in that subchapter heading by paragraph (2) of this subsection.

Paragraph (2) of subsection (c) of section 101 would amend the heading of subchapter I of chapter 51 to read "Subchapter I—Claims" in lieu of "Subchapter I—Applications" in order to indicate more accurately the subject matter of that subchapter.

Subsection (d) of section 101 would amend the table of sections at the beginning of chapter 51 of title 38, United States Code, relating to claims, effective dates, and payments to reflect the addition of the new section 3007 proposed to be made by subsection (a) of this section of the Committee bill.

Section 101—Cost.—Enactment of the provisions of section 101 are estimated to entail no costs.

Section 102

Would amend present section 3311, relating to the Administrator's authority to issue subpenas, to provide that subpenas authorized under that section may be served either by personal delivery

to the person named or by registered or certified mail. This provision is derived from (and intended to have the same substantive effect as) section 205(d) of the Social Security Act (SSA) (42 U.S.C. 405(d)).

Section 102—Cost.—Enactment of this provision would entail no costs.

Section 103

Clause (1) of section 103 would amend subsection (a) of present section 4001 relating to the composition of the Board of Veterans' Appeals, to add language indicating that the Board should dispose of appeals properly before it "in a timely manner."

Clause (2) of section 103 would further amend present section 4001 by adding a new subsection (d), as follows:

New subsection (d): Would require the Chairman of the Board of Veterans' Appeals to submit a report of the appropriate committees of Congress, not later than December 31, 1986, and annually thereafter, on the Board's activity for the prior fiscal year, together with a projection for the fiscal year in which the report is submitted and the subsequent fiscal year. The report must include detailed information on the Board's workload, including a report on the average length of time cases were before the Board, and an evaluation of the Board's ability, based on existing and projected personnel levels, to dispose of cases before it "in a timely manner" as provided in the amendment to subsection (a) of present section 4001 proposed to be made by clause (1) of section 103 of the Committee bill.

Section 103—Cost.—Enactment of the provisions of section 103 would entail no costs.

Section 104

Clauses (1) and (2) of section 104 would amend subsections (a) and (b) of present section 4003, relating to determinations by the Board of Veterans' Appeals, to require that the Board, before reversing its prior decision in an individual case on the basis of additional official information from the service department concerned, provide the claimant with notice of such additional information together with an opportunity to be heard in connection with such information.

Clause (2) of section 104 would also add a new paragraph (2) at the end of present section 4003, which would provide that when the two permanent members on a section of the Board which has either a temporary or acting member designated under section 4001(c)(1) or section 4002(a)(2)(A)(ii) of title 38, United State's Code are split in reaching a decision on a case, the temporary or acting member shall not vote.

Section 104—Cost.—Enactment of the provisions of section 104 are estimated to entail no costs.

Section 105

Would amend present section 4004, relating to the jurisdiction of the Board of Veterans' Appeals, to codify a number of existing practices of the Board and to clarify other practices and procedures in conjunciton with court review of VA decisions, as would be au-

thorized by the amendments proposed to be made by title III of the Committee bill.

Clause (1) of section 105 would amend subsection (a) of present section 4004, relating to a claimant's right to one appeal, which is to be decided by the Board, to provide claimants who have appeals before the Board with the express statutory right to an opportunity for a hearing before the Board, and to require that Board decisions be based exclusively on evidence and material of record in the proceeding and on applicable provisions of law. These changes codify the general practice now followed by the Board, based on the provisions of present section 4005(a) as to a right to a hearing (presently set forth in 38 CFR 19.133(a)) and present section 4005(d)(5) as to the record. This latter provision is proposed to be deleted by section 106 of the Committee bill.

Clause (2) of section 105 would amend subsection (b) of present section 4004, relating to the reopening of Board decisions, to eliminate the requirement that new and material evidence sufficient for a reopening of a previously disallowed claim be in the form of "official reports from the proper service department" (this change is consistent with the Board's current practice of allowing previously denied claims to be reopened on the basis of new and material evidence from any source, although the applicable regulation, 38 CFR 19.155, does not clearly articulate this process). A companion amendment would be made in section 110 of the Committee bill to permit retroactive awards of benefits effective on the date on which an award of benefits under a disallowed claim would have been effective had the claim been allowed, in cases where a disallowed claim is opened on the basis of new material evidence and thereafter allowed and the evidence takes the form of official reports from the proper service department. In addition, clause (2) of this section of the Committee bill would impose a requirement—in lieu of an authorization—of reopening and reconsideration of a claim whenever new and material evidence is secured; would provide for the discretionary reopening and reconsideration of a claim where good cause for reopening is shown; would specify that, with respect to the reopening of claims, the Board may return the claim to the agency of original jurisdiction for action (either on the question of whether the claim is to be reopened or on the merits of the claim, or both); and would specify that a judicial decision (pursuant to the new judicial review provisions added by the amendments made by title III of the Committee bill) upholding, in whole or part, a prior decision of the Board disallowing a claim shall not diminish the Board's authority to reopen (that is, both the mandatory reopening for new and material evidence, and the discretionary reopening for good cause shown) a claim. The latter provision is designed specifically to make it clear that nothing in the new provisions authorizing judicial review is intended to allow the doctrine of *res judicata* to affect the VA's "open file" system of claims adjudication. Thus, the fact of an adverse court ruling on a claim in no way is intended to preclude a veteran or other claimant from continuing to pursue the claim by gathering and offering new and material evidence sufficient to reopen the matter.

Clause (3) of section 105 would amend subsection (d) of present section 4004, relating to the form of Board decisions, to require ex-

pressly that Board decisions state separately findings of fact and conclusions of law on each material issue in the case and that the Board mail a copy of its final decision to the last known address of the claimant and of the claimant's authorized representative, if any. These requirements would codify current Board practices not expressly provided for in regulation, and would provide a statutory basis for procedures that would precede and should facilitate court review of a matter appealed to court. The date on which the decision is mailed to the last known address of the claimant and the claimant's authorized representative would mark the first day of the 180-day period following a Board decision in which a claimant would be permitted to file a civil action under new section 4025 of title 38 (as added by subsection (a) of section 302 of the Committee bill). The provision relating to the contents of the Board's decision, which is derived from the Administrative Procedure Act (APA) (5 U.S.C. 557(c)), is intended to help ensure that decisions of the Board are sufficiently explicit and detailed so as to enable the claimant to understand clearly the basis of the Board's action and, in the case of an appeal to a court, to enable the claimant to state specific grounds for appealing the decision; and to provide the reviewing court with a basis to understand and interpret the decision of the Board.

Section 105—Cost.—Enactment of the provisions of section 105 are estimated to entail no costs.

Section 106

Would amend present section 4005(d)(5), relating to the Board's disposition of appeals to delete the requirement that the Board base its decision on the entire record, inasmuch as that requirement would be included in present section 4004(a) by an amendment proposed to be made by section 105(1) of the Committee bill.

Section 106—Cost.—Enactment of this provision would entail no costs.

Section 107

Would amend present section 4009, relating to the obtaining of independent medical opinions by the Board in medically complex or controverted cases, to add a new subsection (c), as follows:

New subsection (c). Would provide the claimant with the right to request an independent medical opinion when, in a case before the Board, there is a substantial disagreement between the substantiated findings or opinions of two physicians with respect to a material issue in the case and the Board cannot resolve the disagreement in any other way (for example, by interrogatories to one or both physicians, probing the basis for such physician's findings or opinion). In the case of a denial of such a request, the Board would be required to provide the claimant and the claimant's authorized representative, if any, with a statement of its reasons for denying such request, but the Board's decision on such a request would be committed to agency discretion and thus would be final and not subject to judicial review.

Section 107—Cost.—Enactment of this section is estimated to entail no significant costs.

Section 108

Would amend chapter 71 of title 38, United States Code, relating to the Board of Veterans' Appeals, by adding two new sections, one establishing certain procedures to be followed in adjudicatory proceedings within the VA (largely derived from provisions of the APA (5 U.S.C. 554, 555, and 556)) and the other setting forth requirements for the Administrator to apprise claimants of their procedural rights before the VA.

Subsection (a) of section 108 would amend chapter 71 by adding two new sections, as follows:

New section 4010.—Adjudication procedures

Subsection (a) of new section 4010: Would authorize the Administrator, in any hearing, investigation, or proceeding in the VA, in connection with a claim for benefits under laws administered by the VA, to administer oaths, examine witnesses, and take evidence. The statutory granting of this fundamental authority codifies existing VA practice, derived, insofar as subpenaed witnesses are concerned, from present section 3311 though not required by a specific regulation; it is based on an APA provision (5 U.S.C. 556(c)) and is similar to SSA section 205(b) (42 U.S.C. 405(b)).

Subsection (b) of new section 4010: Would provide for the admission of any evidence in VA proceedings, including proceedings before the Board, even evidence that would be inadmissible under the rules of evidence applicable in judicial proceedings, except that the Administrator would be authorized to prescribe regulations allowing exclusion of irrelevant, immaterial or unduly repetitious evidence. This provision, which is based on similar APA (5 U.S.C. 556(d)) and SSA provisions (42 U.S.C. 405(b)), generally codifies the existing VA regulation, 38 CFR 19.133(c).

Paragraph (1) of subsection (c) of new section 4010: Would specify certain procedural rights of claimants in proceedings before the Board of Veterans' Appeals, the first four of which are derived from the APA (5 U.S.C. 556(d)). Thus, the provisions of paragraph (1) of subsection (c) of this new section would give the claimant or the claimant's authorized representative the right, at any time "in the course of any proceeding before the Board" (a phrase which the Committee intends to encompass the period beginning with the filing of the notice of disagreement by the claimant under section 4005(a) of title 38, and ending with a final decision of the Board), to:

Examine the contents of the case files and all documents and records that the VA plans to use in the proceeding and, on the payment of a fee, prescribed pursuant to present section 3302(b), not to exceed the direct cost of duplicating the materials, the right to obtain copies of all such materials.

Present witnesses and evidence restricted only by regulations of the Administrator relating to irrevelant, immaterial, or unduly repetitious evidence as authorized by proposed subsection (b) of this section.

Make arguments to the Board, both orally and in the form of a written brief or similar document, whether submitted during or after the hearing to which they relate, on both substantive and procedural issues.

Submit rebuttal evidence.

Present medical opinions as part of the case, and request an independent medical opinion pursuant to new subsection (c) to present section 4009 (as proposed to be added by section 107 of the Committee bill).

Serve on any person written interrogatories that would have to be answered in writing separately and under oath unless the person served makes an objection to the Administrator. (Paragraphs (3) and (4) of this subsection, discussed below, provide specific procedures for objection to an enforcement of such interrogatories.)

Paragraph (2) of subsection (c) of new section 4010: Would provide that the fee provided for in clause (1)(A) of this subsection for the reproduction of the contents of case files and all materials that the VA plans to use in the proceeding may be waived, pursuant to regulations that the Administrator shall prescribe, either on the basis of a party's inability to pay or for other good cause.

Paragraph (3) of subsection (c) of new section 4010: Would provide that, in the event an individual served with interrogatories under paragraph (1) of this subsection objects to some or all of the interrogatories, the Administrator would be required, pursuant to regulations which the Administrator must prescribe establishing standards consistent with standards for protective orders applicable in United States District Courts (currently Rule 26(c) of the Rules of Civil Procedure for United States District Courts), to evaluate the objection and either order the interrogatories to be answered as served or as modified by the Administrator, or order that the interrogatories need not be answered. In this manner, the Administrator would be available to protect against the use of interrogatories to harass or unduly burden the person served with the interrogatories.

Paragraph (4) of subsection (c) of new section 4010: Would provide that, if a person served with interrogatories under paragraph (1) of this subsection fails to answer or to provide responsive answers and the party serving the interrogatories shows the general relevance and reasonable scope of the evidence sought, the Administrator is to issue a subpena pursuant to present section 3311 of title 38 with enforcement pursuant to present section 3313 of title 38, United States Code, to require the person served with the interrogatories to appear at a deposition on written questions at a location within 100 miles of the witness' residence or place of work. This procedure for enforcing the interrogatories, together with the check provided by the Administrator's evaluation of any objection, is designed to prevent abuse of this discovery tool while providing a claimant with a means of obtaining relevant evidence that would otherwise be unavailable to the claimant. The provisions relating to the use of interrogatories are proposed in lieu of allowing a claimant to subpena a witness to appear at a Board hearing for the purpose of cross-examination by the claimant or the claimant's authorized representative because of concern that such cross-examination would not be consistent with the goal of conducting proceedings by the Board in a nonadversarial fashion.

Subsection (d) of new section 4010: Would provide authority for a hearing officer in any VA proceeding to disqualify himself or her-

self because of personal bias or other cause and also would provide authority for a party to challenge a hearing officer on such basis. This provision is derived from the APA (5 U.S.C. 556(b)).

Subsection (e) of new section 4010: Would specify that the administrative record in a case would consist of the transcript or recording of testimony and the exhibits, all papers and requests filed in the proceeding, and the decision of the Board; and would require the Administration to provide copies of the record to the claimant upon payment of a reasonable fee, prescribed pursuant to present section 3302(b) of title 38, for the direct cost of duplicating the contents of the record for the claimant. The duplicating fee would be waivable on the basis of a party's inability to pay or for other good cause shown.

Subsection (f) of new section 4010: Would specify that, notwithstanding any other provision of law, the adjudication and hearing procedures contained in title 38, and in regulations prescribed by the Administrator thereunder are exclusive. This provision is designed to preclude judicial incorporation of other procedures from the Administrative Procedure Act or elsewhere and, thus to ensure that VA procedures remain informal and nonadversarial in nature.

New section 4011.—Notice of procedural rights: Would require the Administrator to provide, at each stage of the proceedings before the VA, notice, in easily understandable language, to a claimant of procedural rights and the procedures available to obtain various opportunities for review. The purpose of proposed new section 4011 is to protect the procedural rights of claimants by insuring that they are fully informed at each dispositive stage in the administrative process with respect to their opportunities for further review. As used in that section, the term procedural stage relating to disposition of a claim refers to a step in the administrative process at which a decision is reached on a matter relating to the substantive or procedural rights of a claimant. Steps at which notification of procedural rights may be necessary include: notification of an initial decision on a claim for benefits, furnishing of a statement of the case, notification of a Board of Veterans' Appeals decision, and notification of a decision on remand from the Board. Notice of procedural rights is intended to assist claimants in pursuing their claims for benefits with the VA. The Committee believes that this provision can be implemented without costly addition to prevailing Agency practice regarding notice of procedural rights, and that the assistance can be provided without repetitious mailings and lengthy, technical notices. In this regard, it is intended that the Agency rely on easily understood, standardized forms, each of which emphasizes rights available at a particular stage in the administrative process. This provision is also designed to assure that, where there are substantial populations of veterans with limited English-language proficiency, this notice is provided in a language other than English, such as Spanish, which is spoken by a significant percentage of the clientele of the particular VA facility.

Subsection (b) of section 108 would amend the table of sections at the beginning of chapter 71 to reflect the addition of new sections 4010 and 4011 proposed to be made by the amendments in subsection (a) of this section of the Committee bill.

Section 108—Cost.—Enactment of the provisions in section 108 is estimated to entail no significant costs.

Section 109

Would authorize the Administrator to conduct a study, commencing not more than one year after the date of enactment of this bill, of alternative methods of providing speedier claims resolution at locations convenient to claimants' residences. The study could include either or both of two alternative procedures: First, in not more than three geographic areas, a procedure utilizing an intermediate review panel of regional office personnel from the Department of Veterans' Benefits, which would conduct a *de novo* review of the claim prior to any appeal to the Board of Veterans' Appeals; and, second, in not more than three other geographic areas, an enhanced schedule of visits by traveling panels of the Board of Veterans' Appeals (on at least a quarterly basis). If such a study were conducted, the Administrator would be required to report to the Congress on the results of the study, including an evaluation of the cost factors associated with each alternative and the impact on the workload of the regional offices involved and the Board of Veterans' Appeals resulting from each alternative, together with any recommendations for administrative or legislative action, or both, as may be indicated by the study.

Section 109—Cost.—Enactment of this provision is estimated to entail no significant costs.

TITLE II—VETERANS' ADMINISTRATION RULE MAKING

Section 201

Subsection (a) of section 201 would amend subchapter II of chapter 3 of title 38, United States Code, relating to various administrative matters pertaining to the Veterans' Administration, by adding a new section 223, as follows:

New section 223.—Rule making: Would provide that, notwithstanding the preclusion in section 553(a)(2) of title 5, United States Code, of matters involving "loans, grants, benefits, or contracts" from Administrative Procedure Act rulemaking procedural requirements, the VA's rulemaking procedures must be in compliance with the provisions of the Administrative Procedure Act section relating to rule making, section 553 of title 5, United States Code, in connection with any matter other than those involving agency management, personnel, or public property or contracts. Matters which would thus be made subject to the rulemaking requirements of the Administrative Procedure Act would include those involving VA benefits and loans. This section would generally codify the current VA regulations, 38 CFR 1.12.

Subsection (b) of section 201 would amend the table of sections at the beginning of chapter 3 of title 38, United States Code, relating to general administrative matters pertaining to the Veterans' Administration, to reflect the addition of the new section 223 proposed to be made by subsection (a) of this section of the Committee bill.

Section 201—Cost.—Enactment of this provision is estimated to entail no costs.

TITLE III—JUDICIAL REVIEW

Section 301

Would amend section 211(a) of title 38, United States Code, relating to decisions by the Administrator, which generally precludes judicial review of decisions of the Administrator in matters relating to claims for benefits under laws administered by the VA, to add to the matters to which such preclusion does not apply, subchapter II of chapter 71, the new judicial review subchapter proposed to be added by section 302 of the Committee bill.

Section 301—Cost.—Enactment of this provision is estimated to entail no costs.

Section 302

Subsection (a) of section 302 would amend chapter 71 of title 38, United States Code, relating to the Board of Veterans' Appeals, to add a new subchapter II, entitled "Judicial Review", which would authorize and prescribe procedures for access to the Federal court system for review of certain VA decisions and would consist of new sections 4025 through 4029, as follows:

New section 4025.—Right of review; commencement of action: Would establish a right of review in Federal court for the review of a case involving a claim for benefits under laws administered by the Veterans' Administration and would set forth procedures related to bringing an action for such review.

Subsection (a) of new section 4025: Would define (1) "final decision of the Administrator", as used in subsection (b) of this new section, to include not only a decision on the merits pursuant to section 4004(a) (as proposed to be amended by section 105 of the Committee bill), but also a refusal to reopen a claim pursuant to section 4004(b) (as proposed to be amended by section 105 of the Committee bill), or a refusal on the basis of nonconformity with present chapter 71 provisions relating to form or manner of appeals actions, pursuant to present section 4008, or on the basis of a lack of timeliness, pursuant to present section 4005, to consider a claim, and (2) "claim for benefits", as used in subsection (b) of this new section and elsewhere in this new judicial review subchapter, to include not only an initial claim filed under present section 3001 of title 38 but also a challenge to a decision reducing, suspending, or terminating a benefit as well as any request by or on behalf of a claimant for reopening, reconsideration, or further consideration of either an initial claim or a challenge to a decision reducing, suspending, or terminating benefits. This definition of "claim for benefits" is intended to remove any possible doubt that the provisions authorizing a right to judicial review apply in cases other than initial claims for benefits.

Subsection (b) of new section 4025: Would provide for court review of a "final decision" (as defined in subsection (a) of this new section) in a matter involving a claim for benefits (also as defined in subsection (a) of this new section) under laws administered by the Veterans' Administration. A civil action seeking such review could be brought in Federal district court in either the home district of the claimant or in the district court where the Board of Veterans' Appeals is situated (presently the District of Columbia),

and must be brought within 180 days (the same period as is allowed for bringing an action in Federal court in connection with a tort claim against the United States, as provided for in 28 U.S.C. 2401(b), following final denial of such claim by the Federal agency involved, as required by 28 U.S.C. 2675(a)) after the notice of the Board of Veterans' Appeals decision is mailed to the claimant pursuant to new section 4004(d) (as proposed to be added by clause (3) of section 105 of the Committee bill).

Subsection (c) of new section 4025: Would require that the complaint in a case seeking court review of a decision relating to a claim for benefits, brought pursuant to subsection (b) of this new section, shall include sufficient information in the complaint (for example, the date of the final Board of Veterans' Appeals decision and the claimant's VA claim number) to assist the VA in identifying and locating the claimant's file.

Subsection (d) of new section 4025: Would require the Administrator to file with the court, not later than 30 days after filing the answer to the complaint, certified copies of all of the records upon which the findings of fact and decision complained of are based or, if the Administrator determines that the cost of filing all of those records would be unduly expensive, would permit the Administrator to file a complete index of all of the materials comprising these records. If such an index is filed, the reviewing court would consider requests from all parties for the filing of specific record materials and, thereafter, would order the Administrator to file certified copies of the indexed items that the court deems relevant to its consideration of the case.

Subsection (e) of new section 4025: Would provide that the court has the power to dispose of a case on the pleadings and record certified under subsection (d) of this new section. It is anticipated that the court's use of this authority should reduce unnecessary expenditures of judicial resources. As noted in the "Final Report—Study of the Social Security Administration Hearing System" by the Center for Administrative Justice (October 1977): "The amount of time invested in an average case [under the SSA] is undoubtedly very small. Most disability cases present simple issues. There is no trial and often not even an oral appearance."

Subsection (f) of new section 4025: Would limit judicial review as provided for in subsection (b) of this new section to cases in which the initial claim for benefits is filed with the Administrator (pursuant to present section 3001(a)) by the end of the fifth fiscal year after the effective date of the Act, and would further require that the complaint initiating the Federal district court action be filed within 180 days after notice of the first final BVA decision rendered after that fifth year is mailed to the claimant under section 4004(d) of title 38, as proposed to be amended by section 105 of the Committee bill. The term "first final decision" of the BVA is defined to include a decision based on a reopening for new and material evidence, as long as the reopening occurs within 180 days after the mailing of notice under such amended section 4004(d). These provisions would have no effect on the availability of remedies under new subchapter II of chapter 71 in connection with any claim filed within the time limits. This "sunset" provision on new claims is intended to require the Congress to evaluate the new judi-

cial review provisions before making such provisions permanent or extending them further. In addition, this subsection would preclude actions being brought under this new section regarding matters under present chapter 19 of title 38, relating to insurance, and under present chapter 37 of title 38, relating to home, condominium, and mobile-home loans and loan guaranties. There are currently in both chapters provisions for, and procedures established relating to, judicial review, and no need to change such procedures has been suggested or shown.

New section 4026.—Scope of review: Would define a reviewing court's role in considering actions brought under the proposed new judicial review chapter. The provisions are derived, with certain modifications, from the APA scope of review provisions in 5 U.S.C. 706.

Clause (A) of paragraph (1) of subsection (a) of new section 4026: Would authorize a reviewing court to decide all relevant questions of law and interpret constitutional and statutory provisions and to determine the meaning or applicability of the terms of an action of the Administrator.

Clause (B) of paragraph (1) of subsection (a) of new section 4026: Would authorize a reviewing court to compel action of the Administrator that the Administrator has unlawfully withheld.

Clause (C) of paragraph (1) of subsection (a) of new section 4026: Would define the court's authority to hold unlawful and set aside decisions, findings, and conclusions of the Administrator—except findings of material fact made in reaching a decision on a claim for benefits, the review of which would be governed solely by clause (D) of this subsection, discussed below. Specifically, the court would be empowered to reverse a decision of the Administrator if such a decision is found to be: (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege or immunity; (C) in excess of statutory jurisdiction, authority or limitations, or in violation of a statutory right; or (D) without observance of procedure required by law. As noted above, this authority to reverse is largely derived from the APA.

Clause (D) of paragraph (1) of subsection (a) of new section 4026: Would provide that, in the case of a finding of material fact made in reaching a decision on a claim for benefits, a court is empowered to hold unlawful and set aside such a finding when it is so utterly lacking in a rational basis in the evidence that a manifest and grievous injustice would result if such finding were not set aside. Under paragraph (2) of subsection (a) of this new section, this authority is specifically limited so as to require the court, before setting aside the finding, to specify where it finds the record to be deficient and to remand the case once, for a time-limited period, to allow the Administrator either to reconsider the decision or substantiate the record. It is the Committee's intention that this limit on a reviewing court's authority to set aside findings of fact in individual claims cases, together with the provision limiting court review of factual issues in such cases to an evaluation of whether a finding is so utterly lacking in a rational basis as to result in a manifest and grievous injustice, should serve to restrict court review of factual matters substantially more tightly than is the

case where review is authorized (as in the APA, 5 U.S.C. 706) to determine whether a Federal agency's decision on a factual issue is "supported by substantial evidence".

The Committee takes note of certain views of the Department of Justice submitted to the Committee on the Judiciary on August 17, 1982, at a time subsequent to the reporting and discharge of S. 349 (the predecessor in the 97th Congress of S. 367) from the Veterans' Affairs and Judiciary Committees. In that letter, concerns were expressed that the new standard of factual review contained in new section 4026, as proposed to be added to title 38 by section 302 of S. 349, S. 636, and S. 367, might present significant problems of judicial construction, by requiring reviewing courts to engage in what the Department of Justice perceives to be a complicated three-part test. As stated in the letter: "A court will be required to determine what degree of evidence constitutes a 'rational basis' for a finding, how far removed from a 'rational basis' a finding may be before it is deemed to cause 'a manifest and grievous injustice,' and what degree of hardship must be present before a finding causes 'a manifest and grievous injustice.'" The end result of this process, it was stated, could in effect approximate a "substantial evidence" standard.

The Committee must emphasize once again that the judicial review provisions of this legislation were specifically designed to provide for a far more restrictive scope of review than is available under the "substantial evidence" test—in order to preclude reviewing courts from simply substituting their judgment for that of the agency—and to do so by means of a standard so strongly worded as to leave no question as to the intent of the Congress. The standard established under the present clause should be viewed as a unit, not dismantled into three or more disparate and unconnected parts. The Committee notes that, had it intended that a reviewing court should make separate findings as to whether there is a "rational basis" and whether "a manifest and grievous injustice would result," it would have framed these two elements in two separate clauses. By not adopting that approach, the Committee emphasizes that it intends that reviewing courts should pursue a straightforward, one-step inquiry into whether the court is certain that the agency was wrong. To the extent that the reviewing court has any uncertainty as to the meaning of this standard, it is expected that clarification will be sought from the legislative history first and foremost, rather than through independent judicial construction.

The Committee also notes with concern that the views submitted by the VA at the Committee's March 23, 1983 hearing, proceed upon the assumption that the standard established by the Committee under this clause is nothing more than a "rational basis" test, and that such a standard is of uncertain scope and will invite *de novo* review and substitution of judgment by reviewing courts on factual matters. The Committee cannot emphasize too strongly that to equate the standard of "so utterly lacking in a rational basis in the evidence that manifest and grievous injustice would result" with a mere "rational basis" test is entirely unsupported by and contrary to the express language of the statute and the clear intent of the Committee as set forth in report language. As the Committee report on S. 349 makes abundantly clear, the Committee has

expressly rejected the present Administrative Procedure Act formulation of the "arbitrary and capricious" test, because of the considerable judicial confusion that exists as to its precise meaning, and has crafted instead the new standard contained in the Committee bill essentially to clarify its intention to allow only a very narrow review of factual determinations in individual benefits adjudications, and to ensure that this intention will be followed by the courts and will not be frustrated by judicial practice developed in other contexts. Thus, the ultimate intent of the new standard provided in this clause is to preserve the role of the Board of Veterans' Appeals as the primary expert arbiter of factual matters involving claims for VA benefits.

Paragraph (2) of subsection (a) of new section 4026: Would, as noted above in the analysis of clause (D) of paragraph (1) new section 4026(a), limit a court's authority under that claim to set aside a finding of material fact made in reaching a decision in a claim for VA benefits. Thus, the court, before setting such a finding aside, would be required to specify where it finds the record to be deficient and to remand the case once, for a time-limited period, to allow the Administrator either to reconsider the decision or substantiate the record. In remanding the case under this paragraph, the court would be required to specify a reasonable period of time for the Administrator to complete action under the remand. If the Administrator has not completed action within the specified period of time, the case would be returned to the court at the end of that period for further action by the court.

Subsection (b) of new section 4026: Would incorporate the rule of prejudicial error from the APA (5 U.S.C. 706) in order to define further a reviewing court's role. Thus, pursuant to this rule, a court would be expected to disregard errors in the administrative record that are not significant to the outcome of the matter.

Subsection (c) of new section 4026: Would clarify a reviewing court's role in relation to questions of fact decided by the Administrator by specifying that in no event shall such findings be subject to a trial *de novo* in the reviewing court.

Subsection (d) of new section 4026: Would provide that, in reviewing a matter resolved by the VA solely on the basis of a failure to conform to VA regulations or procedures, the reviewing court may consider only those issues relating to the validity of or conformity with the regulation or procedure. Thus, if a court were to uphold the validity of a regulation or procedure and its application to the facts of a case, the matter would be ended; but if, on the other hand, the court were to rule that the regulation or procedure is unlawful, the underlying claim for benefits must be returned to the VA for its consideration, and the VA's role as the principal arbiter of VA claims matters would thus be preserved. The Committee notes that, in the context of court review of the validity of or conformity with a VA regulation or procedure, VA factual determinations primarily associated therewith—for example, a determination that a claimant had not in fact met a particular filing deadline—are not intended to be subject to review as a finding of material fact made in reaching a decision on a claim for benefits under section 4026(a)(1)(D) as proposed to be added to title 38 by this section of the Committee bill. Such determinations should be reviewed

under this subsection according to the appropriate standards of review otherwise contained in proposed new section 4026(a)(1)(C).

New section 4027.—Remands: Would provide for three different types of remands (two mandatory and one discretionary), in addition to the mandatory remand provisions to be provided for under new section 4026(a)(2). Under the first, the court would be required to remand the case, if the Administrator so requests after it is appealed to court and before the Administrator files an answer, for a single reconsideration by the Administrator, which must be completed within 90 days or the matter would be returned to court. This provision is derived from a similar one in the SSA (42 U.S.C. 405(g)) but modified to place a specific limit on the amount of time allowed before the case must be returned to court. The second remand provision would allow the reviewing court, in its discretion, to remand a case for further action after the Administrator has filed an answer. The third remand provision would require a court to remand a matter when either party applies for leave to adduce further evidence and shows "good cause" for the remand. In the Committee's view, the burden of showing good cause for the remand should be applied to protect parties and administrative and judicial processes from dilatory practices but not so as to create undue impediments to the Administrator's consideration of additional evidence bearing on the merits of a claim. The new section would thus authorize a reviewing court to specify a time period within which the Administrator must act on a matter remanded under either the second or third remand provisions in this new section.

New section 4028.—Survival of actions: Would provide that actions brought under new section 4025 would survive the tenure of any individual as Administrator.

New section 4029.—Appellate review: Would provide that decisions of district courts pursuant to the new judicial review chapter would be subject to review in higher Federal courts in the same manner as other civil judgments.

Subsection (b) of section 302 would amend the table of sections at the beginning of chapter 71, relating to the Board of Veterans' Appeals, to reflect the addition of the new subchapter II proposed to be made by subsection (a) of this section of the Committee bill.

Section 302—Cost. Enactment of this provision is estimated by the Congressional Budget Office to result in costs of $2 million to the Veterans' Administration in fiscal year 1986.

Section 303

Would amend present section 1346 of title 28, United States Code, relating to the jurisdiction of Federal district courts when the United States is the defendant, to provide that the exclusion contained therein limiting the jurisdiction of Federal district courts in matters involving pensions shall not apply to VA pension matters. This is a conforming amendment to effectuate the purpose of the new subchapter II of chapter 71 that would be added by section 302 of the Committee bill.

Section 303—Cost.—Enactment of this provision is estimated to entail no costs.

TITLE IV—ATTORNEYS' FEES

Section 401

Would amend present section 3404 of title 38, United States Code, relating, in connection with VA proceedings, to the recognition of agents and attorneys and to attorneys' fees, to revise the present title 38 limitation of $10 for claimants' attorneys' fees by providing for the approval by the Administrator of reasonable attorneys' fees, within certain specified limits, for representation of individuals before the Veterans' Administration following an initial decision of the Board of Veterans' Appeals, and for approval by the court of reasonable attorneys' fees in cases appealed to court.

Section 401 would amend present subsection (c) of present section 3404, to provide for approval by the Administrator of attorneys' fees above the present $10 maximum for services rendered in representing a claimant following an initial decision of the Board of Veterans' Appeals, but would retain the $10 maximum limitation for cases resolved prior to Board action or upon the first decision in the case by the Board. The Committee bill would also remove an ambiguity as to whether the $10 limitation applies under current law to all attorneys practicing before the VA, by deleting the phrase "recognized under this section" from the text of section 3404(c). With respect to claims resolved within the VA but following an initial decision of the Board, the Administrator's approval of an attorneys' fee is limited to:

> (A) if the claimant and attorney have entered into a contingent-fee agreement, an amount not in excess of 25 percent of the total of past-due benefits awarded, or
>
> (B) if the claimant and attorney have not entered into such an agreement, the lesser of (i) the fee agreed upon by the claimant and the attorney or (ii) $500 (an amount which could be increased administratively by the Administrator in future years as warranted by changed economic conditions) except that a greater amount may be approved by the Administrator in an individual case involving extraordinary circumstances warranting such a higher fee.

Thus, approved fees for legal representation before the VA following an initial decision of the Board would generally be limited to a maximum of $500 unless the claimant and attorney have entered into a contingent-fee agreement and the matter is resolved in a manner favorable to the claimant, in which case the limitation would be 25 percent of any past-due benefits awarded in the claim. The Committee does not anticipate that the Administrator would have occasion to approve a fee in excess of $500 on the basis of "extraordinary circumstances" except in the most unusual of cases where an attorney is able to demonstrate that the facts and circumstances of the case where so markedly different, in terms of complexity or difficulty, from the average case before the Administrator, that an exceptional amount of time was legitimately required to prepare and present it.

Section 401 would further amend present section 3404 of title 38, United States Code, by adding five new subsections (d) through (h), as follows:

New subsection (d): Would define the court's role in approving attorneys' fees in cases appealed to court under the new judicial review subchapter as proposed to be added by section 302 of the Committee bill. In a case that is resolved in a manner favorable to the claimant (as that result is defined in new subsection (g) of this section), the court may approve a reasonable fee to be paid by the claimant to his or her attorney, with the limitation that, if the claimant and attorney have entered into a contingent-fee agreement, the amount of the fee is limited to 25 percent of the total amount of past-due benefits awarded in the case. In the event that a matter is not resolved in a manner favorable to a claimant in court, the reviewing court may approve a limited reasonable fee, not to exceed $750, taking into consideration the extent to which success appeared reasonably probable when the action was filed. Of course, where the claimant and attorney have entered into a contingent-fee agreement, no fee could be approved unless court review ultimately results in an award of past-due benefits.

New subsection (e): Would provide authority for the Administrator to authorize payment to an attorney from any past-due benefits that are awarded by the Administrator or a court but would specifically preclude the VA from making payments out of any future benefits accruing to a claimant on the basis of the action.

New subsection (f): Would limit the applicability of the new attorneys' fees section, section 3404 (as proposed to be amended by this section of this Committee bill), to cases involving claims for benefits under laws administered by the VA. Thus, in all other types of cases (for example, constitutional challenges to regulations, Freedom of Information Act cases, and other claims for relief other than VA benefits) where no claim for benefits is involved, the fee agreement between the individual and the attorney would not be restricted by the provisions of this section.

New subsection (g): Would provide that, for the purposes of this section, a claim is to be considered as having been resolved favorably to a claimant when any or all of the relief sought is granted.

New subsection (h): Would provide that a court may, in its discretion and as an extraordinary remedy, allow a prevailing party, other than the Administrator (representing the interests of the United States), reasonable attorneys' fees as part of the costs awarded after the decision, in accordance with the provisions (whether expired or not) of section 2412(d) of title 28, relating to awards of attorneys' fees to the prevailing party in any civil action brought by or against the United States or any agency and any official of the United States acting in his or her official capacity. Section 2412 was enacted in the Equal Access to Justice Act, Public Law 96–481, and was subject to a "sunset provision" of October 1, 1984, as provided in section 204(c) of that Act. Legislation to extend that authority was vetoed in 1984 and, at present, the authority has lapsed. The Committee notes, however, that legislation is currently pending in the Congress to reestablish the authority. To the extent that legislation is enacted reestablishing or revising that authority, the Committee intends at such time to reexamine this issue and then determine whether awards of attorneys' fees to a prevailing claimant under this subsection of the Committee bill should be made in accordance with that authority as so reestab-

lished or revised. At present, the Committee intends that awards of attorneys' fees shall be made in accordance with the provisions of section 2412(d) of title 28 as in effect just prior to the sunset date. This provision is intended to permit a court to evaluate all of the circumstances of a claim and, in particular, the VA's basis for denying the relief requested and its conduct with respect to the claimant. The Committee's intention is that the court's evaluation of the VA's actions be carried out in the same manner as the courts evaluate government agency actions under the Equal Access to Justice Act, where a party other than the government may be awarded attorneys' fees if the government does not prevail and cannot establish that its position was substantially justified.

Section 401—Cost.—Enactment of the provisions in section 401 are estimated to entail no cost.

Section 402

Would amend present section 3405 of title 38, United States Code, relating to penalties for certain acts, to delete a gender reference and to strengthen this provision by making it a Federal criminal offense for an attorney or other person willfully and intentionally to defraud a VA claimant.

Section 402—Costs.—Enactment of this provision is estimated to entail no costs.

TITLE V—EFFECTIVE DATES

Section 501

Would make the Act effective on the first day of the month beginning 180 days after the date of enactment.

Section 502

Would allow for judicial review, pursuant to proposed new section 4025 (as proposed to be added by section 302(a) of the Committee bill), of decisions of the Board of Veterans' Appeals rendered on or after April 1, 1985.

TABULATION OF VOTES CAST IN COMMITTEE

In compliance with paragraph 7 of rule XXVI of the Standing Rules of the Senate the following is a tabulation of votes cast in person or proxy by Members of the Committee on Veterans' Affairs at the June 12, 1985, Committee meeting to consider S. 367.

The Committee agreed to report S. 367 favorably to the Senate by a 12-0 vote, as follows:

YEAS—12	NAYS—0
Frank Murkowski	
Alan Simpson	
Strom Thurmond	
Robert Stafford	
Arlen Specter	
Jeremiah Denton	
Rudy Boschwitz	
Alan Cranston	
Spark Matsunaga	

Dennis DeConcini
George Mitchell
John Rockefeller

Agency Report

On June 7, 1985, the Veterans' Administration submitted to the Committee on Veterans' Affairs a report on S. 367.

The Agency's report follows:

Office of the
Administrator
of Veterans Affairs

Washington DC 20420

Veterans
Administration

JUN 7 1985

Honorable Frank H. Murkowski
Chairman, Committee on Veterans' Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I am pleased to respond to your request for a report on S. 367, 99th Congress, entitled the "Veterans' Administration Adjudication Procedure and Judicial Review Act." This measure is virtually identical to S. 636, 98th Congress, passed by the Senate on June 15, 1983.

On June 1, 1983, we submitted a lengthy report to this Committee detailing the reasons for our opposition to S. 636. These same reasons apply to the provisions of S. 367 and likewise provide the basis for the Agency's opposition to its enactment. Because of the length of our June 1, 1983 report and the close similarity between the two measures, we will not repeat our detailed discussion of the many technical points raised by this legislation nor our extensive elaboration of the issues we believe to be particularly important. Rather, we refer the Committee to the enclosed copy of our report on S. 636 with its several enclosures, including a section-by-section analysis and 8-part appendix, for this information. In the present report, we summarize our primary comments on the measure and discuss the provisions of S. 367 which differ from or were not included in S. 636 at the time we prepared our 1983 report. In addition, we have included an updated estimate of the costs to the VA should S. 367 be enacted.

This measure contains four titles which contemplate numerous changes in present law concerning claims for benefits administered by the Veterans Administration (VA). First, the bill would codify, with some changes, the internal adjudication procedures now used by the Agency in making benefit decisions. Second, it would statutorily subject VA rulemaking to the provisions of the Administrative Procedure Act contained in 5 U.S.C. § 553. Third, the bill would provide access to the courts to claimants dissatisfied with VA benefit decisions. Finally, the legislation would substantially revise the current $10 statutory limitation on the fee an attorney may receive for representing an individual claimant seeking veterans benefits.

The provision of the bill of overriding significance to this Agency and to veterans is title III, which provides for judicial review of individual VA benefit determinations. The remaining titles largely seek to facilitate implementation of this change. Because we believe the proposed judicial review of individual VA benefit decisions is inadvisable and unjustified, we oppose adoption of this measure in its entirety.

We share with the Congress, and particularly this Committee, the goal of providing for veterans and their families a fair and compassionate adjudication system. We simply believe, both philosophically and as a practical matter, that such a system does not have to include Federal court intervention to achieve that goal.

We remain convinced that our present adjudication procedures provide a fair and efficient means of resolving veterans benefit claims and are preferable to a system involving judicial readjudication of individual benefit decisions. It is our considered opinion that the informal, nonadversary nature of our claim procedures, combined with our willingness to assist in developing evidence, to provide a personal hearing at virtually any stage of the adjudication process, and to grant a claimant the benefit of the doubt, not only meet the requirements of due process, but provide greater protection to claimants than is available in comparable proceedings at other agencies. Moreover, the right to appeal and obtain a de novo review of an original appeal by the Board of Veterans Appeals (BVA), without the significant costs of litigation, provides an effective and practical method to correct the few errors that inevitably occur in individual cases in any adjudication system, including the Federal courts.

Another relevant factor militating against the need for judicial review of individual benefit decisions is that there is nothing to indicate that the current preclusion of judicial review results in injustice. To the contrary, as this Committee has noted in the past, there is no evidence that most VA claimants are not satisfied with the resolution of their claims for benefits. S. Rep. No. 97-466, 97th Cong., 2d Sess. 24 (1982).

Likewise, the constitutionality of 38 U.S.C. § 211(a), the statute precluding court jurisdiction over veterans benefit claims, has been consistently upheld by the courts,

and we are unaware of any due process guarantee that mandates a right to judicial review. Rather, our research confirms the continued viability of the principle that Congress, when it creates rights in individuals against the Government, is under no obligation to provide a judicial remedy. It may instead establish only an administrative remedy, provided fundamental due process requirements are met.

Contributing to the problems inherent in judicial review of VA benefit decisions is the difficulty in defining an appropriate standard of review. The recognized uncertainty surrounding the various standards of factual review, see K. Davis, Administrative Law of the Seventies § 29.00 (1976), and the tendency of the Federal judiciary to extend its jurisdiction through expansive reading of jurisdictional statutes leads us to conclude that judicial review of VA findings of fact is inadvisable. For these reasons, we believe that any attempt to provide judicial review of VA factual determinations regarding benefit claims would be inappropriate and would endanger the proper functioning of the Agency's administrative process, a process that most interested parties agree has provided substantial justice and fair treatment to veterans.

With regard to the remaining provisions of the bill, we note that many of the adjudicatory procedures included in title I merely restate existing Agency practices, while others are clearly intended to complement the provisions concerning judicial review contained in title III. In our view, title I is unnecessary in the absence of judicial review and we thus recommend against its adoption.

We note that title II of the bill, requiring the VA to comply with the notice and comment provisions of 5 U.S.C. § 553 in Agency rulemaking, parallels the procedure already in use by the VA for benefit regulations. 38 C.F.R. § 1.12. Therefore, legislation is unnecessary to achieve this purpose.

Finally, we are not prepared to support the significant modifications to the present statutory attorney fee limitation, 38 U.S.C. § 3404, that would occur under title IV of this bill, primarily because we oppose the diversion of benefits to anyone other than the proper VA beneficiary.

As noted above, a few of S. 367's provisions differ from those in S. 636 or were not included in S. 636 when we prepared our June 1, 1983 report. These new or different provisions include the following:

(1) a limitation on the role of "temporary" or "acting" BVA members, subsection 104(2)(C);

(2) an authorization preserving current VA practice with respect to retroactive awards, section 110;

(3) an exception to the rule-making requirements for matters pertaining to Agency management, personnel, or public property or contracts, section 201(a);

(4) a 30-day period after the filing of an answer in a civil action in which the Agency is to file the record upon which the decision complained of is based, section 302(a)(2);

(5) a clarification of the bill's sunset provisions, section 302(a)(2); and

(6) a modification of the punitive attorney fee provision to reflect the applicability of the Equal Access to Justice Act (EAJA) notwithstanding its expiration, section 401.

The VA provided technical assistance in drafting several of these new or different provisions and the technical problems we identified have been corrected. We believe, however, that our opposition to two of these provisions warrants discussion here.

Our first concern in this regard involves section 104(2)(C), which prohibits a "temporary" or "acting" BVA member from voting in cases where the two permanent members of the section disagree. In these situations, enactment of section 104(2)(C) would require review of the case by a permanent member of another BVA section. This would, of course, result in an increase in the processing time for that decision. In some cases, the additional processing time required would not be limited to the time needed by the substitute permanent member to review the case, but would also include the time necessary to contact the appellant to

determine whether he or she desires another personal hearing, since all three members of the hearing panel would not be making the final determination. Moreover, notwithstanding the substitution of the permanent member, in all probability, the revised decision would still not be unanimous and would be referred to the Chairman as required under 38 U.S.C. § 4003(b).

In our view, the limitation on a "temporary" or "acting" BVA member found in section 104(2)(C) is not only administratively inefficient, but unnecessary as well. The rationale for the prohibition given by this Committee in its report on S. 636 was that "the Committee does not believe that these new authorities ["temporary" and "acting" members] should be allowed to alter the fundamental nature of the Board as an independent entity made up of individuals appointed with the approval of the President . . . ." S. Rep. No. 98-130, 98th Cong., 1st Sess. 24 (1983). This concern, however, is already met by present legislative restrictions that expressly limit both when "temporary" and "acting" members can be used and the length of time individuals may serve in those capacities.

Moreover, we do not believe that the use of "temporary" or "acting" members in any way adversely affects appellants. The individuals selected to serve in either capacity are some of the most experienced attorneys at the Board and are all generally eligible for appointment as permanent BVA members. These individuals are fully capable of making independent judgments on all cases without being unduly influenced merely because a disagreement exists between the two permanent members of the section.

In our view, any useful purpose this provision may serve is clearly outweighed by the delay it may cause in decision-making and the loss of administrative efficiency that would result. Accordingly, we oppose the limitation found in section 104(2)(C) of the bill.

Another provision of S. 367 which we believe warrants specific comment at this time is the new subsection (h) added to 38 U.S.C. § 3404 by section 401 of the bill. This provision would authorize a court to award attorney fees to a prevailing party, to be paid by the Government in accordance with the provisions of the Equal Access to Justice Act (EAJA), notwithstanding the repeal of the EAJA through operation of its sunset provision.

In view of the commitment of Congress and this Administration to the policies underlying the EAJA, it appears likely that the Act will be reauthorized. The reauthorization, however, is equally likely to include modifications and improvements, which, under new subsection 3404(h), will not be available to VA claimants seeking court awarded attorney fees. In this regard, we note H.R. 5479, enacted by the 98th Congress and vetoed by the President, differed in certain respects from the EAJA as originally enacted. In our view, any modifications or improvements resulting from the experience obtained under the EAJA and incorporated into its anticipated reauthorization should apply to VA claimants on the same basis as they will apply to other litigants. Any other result would appear to be inequitable, and, accordingly, we oppose new subsection 3404(h).

In summary, it is the VA's position that the present system of informal adjudication of claims for veteran benefits is working efficiently and fairly, and that no widespread injustice has resulted from this system. In view of this record, we believe the potential costs and burdens associated with judicial involvement in the day-to-day process of claim adjudication have not been adequately justified. The remaining provisions of the bill are largely dependent on the adoption of judicial review of individual VA benefit decisions and are unnecessary in the absence of such review. For these reasons, we oppose passage of S. 367.

It is difficult to predict the number of dissatisfied VA claimants who may decide to appeal to the courts. Based upon the current BVA caseload, and using the Social Security system rate of appeals as a model, however, it may be anticipated that approximately 4500 VA cases would be filed annually in Federal courts. We are unable to estimate either the costs of the increased caseload on the court system or the cost of the Department of Justice to litigate these cases.

It is estimated that the administrative cost to the VA of enactment of S. 367 would be as follows:

FISCAL YEAR	ADMINISTRATIVE COST (000's)
1986	$11,544.7
1987	10,685.5
1988	9,569.8
1989	9,684.5
1990	9,801.6

These costs do not include any payments of attorney fees that may be awarded pursuant to the authority of the new subsection (h) of 38 U.S.C. § 3404. We are unable to estimate the cost of this provision, since these fees will depend upon the number of the claims allowed, and what each individual judge may consider a "reasonable" fee.

It should be recognized, however, that an attorney fee award under new subsection 3404(h) would be virtually automatic in any case in which a court sets aside a VA finding of fact as "so utterly lacking in a rational basis in the evidence that a manifest and grievous injustice would result if such finding were not set aside." Under subsection 3404(h), a prevailing party would be entitled to an attorney fee award unless the position of the Government were substantially justified or special circumstances made an award unjust. After setting aside a VA decision under the "utterly lacking in a rational basis" standard, a court would seem to have little choice but to conclude that the Government's position was not substantially justified.

The administrative costs summarized above are predicated on maintaining the present 65-member limit on the size of BVA. 38 U.S.C. § 4001(a). Based upon the current BVA case backlog and the anticipated increase in its workload from judicial review, we believe BVA would not be able to carry out the mandate in section 103(l) of the bill to dispose of appeals in a timely manner if the 65-member limit were continued. Unless an increase in the number of BVA members were authorized, we estimate the average BVA response time would increase to approximately 405 days by fiscal year 1990. We believe that to meet the "timely manner" directive, the average BVA response time should be approximately 120 days. To accomplish this goal after enactment of S. 367, we estimate that a minimum of 87 members would be required. The appended methodology contains an alternative cost estimate for an expanded BVA, and it should be noted that under this current services approach the administrative costs would be substantially increased.

Finally, it should be recognized that the costs included in the above summary do not include estimated benefit costs. As noted above, it is difficult even to estimate the number of VA cases that would be filed in the courts. To attempt to further extrapolate the number of claimants that would be successful in court and the additional benefit costs that would result from successful cases is virtually impossible.

Rather than engage in sheer speculation, we offer no view on potential benefit costs, although the enclosed cost-estimate methodology contains one possible scenario.

A detailed explanation of the costs that may result from enactment of S. 367 is provided as an appendix to this report.

Advice has been received from the Office of Management and Budget that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

Everett Haney

HARRY N. WALTERS
Administrator

Deputy Administrator • Fot

Enclosure

Office of the
Administrator
of Veterans Affairs

Washington, D.C. 20420

Veterans
Administration

JUN 1 1983

Honorable Alan K. Simpson
Chairman, Committee on Veterans' Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I am pleased to respond to your request for a report on S. 636, 98th Congress, as introduced. This measure, entitled the "Veterans Administration Adjudication Procedure and Judicial Review Act," is similar to S. 349, 97th Congress, passed by the Senate on September 14, 1982.

For reasons set out below, we oppose enactment of the bill.

The bill contains four titles which contemplate numerous changes in present law concerning claims for benefits administered by the Veterans Administration (VA). First, the bill would codify, with some changes, the internal adjudication procedures now used by the Agency in making benefits decisions. Second, it would statutorily subject VA rulemaking to the provisions of the Administrative Procedure Act contained in 5 U.S.C. § 553. Third, the bill would provide access to the courts to claimants dissatisfied with VA benefit decisions. Finally, the legislation would substantially revise the current $10 statutory limitation on the fee an attorney may receive for representing an individual claimant seeking veteran benefits.

The provision of the bill of overriding significance to this Agency and to veterans is title III, which provides for judicial review of individual VA benefit determinations. The remaining titles largely seek to facilitate implementation of this change. We believe the proposed judicial review of individual VA benefits decisions is inadvisable and unjustified, and we therefore oppose adoption of this measure in its entirety.

We share with the Congress, and particularly this Committee, the goal of providing for veterans and their families a fair and compassionate adjudication system. We simply believe, both philosophically and as a practical matter, that such a system does not have to include Federal court intervention to achieve that goal.

We are cognizant of the recent history of judicial review legislation dating back to the 95th Congress and the similarity of this bill to legislative proposals commented on at length by this Agency in the past. Because of the many technical issues raised by S. 636, we summarize our primary comments in this letter and enclose a section-by-section analysis with specific comments and an appendix elaborating on the points we regard as particularly important.

The principal issue raised by this measure is whether judicial review of individual VA benefit decisions is warranted. We are convinced that our present adjudication procedures provide a fair and efficient means of resolving veterans benefit claims and are preferable to a system involving judicial readjudication of individual benefit decisions. It is our considered opinion that the informal, nonadversary nature of our claim procedures, combined with our willingness to assist in developing evidence, to provide a personal hearing at virtually any stage of the adjudication process, and to grant a claimant the benefit of the doubt, not only meet the requirements of due process, but provide greater protection to claimants than is available in comparable proceedings at other agencies. (Section I, Appendix). Moreover, the right to appeal and obtain a de novo review by the Board of Veterans Appeals (BVA), without the significant costs of litigation, provides an effective and practical method to correct the few errors that inevitably occur in individual cases in any adjudication system, including the Federal courts. (Section II, Appendix).

We think that the most significant defect in the bill is the proposed judicial review of factual determinations made by the BVA in individual benefit decisions. Judicial review of challenges as to the constitutionality of statutes governing veteran benefits already exists. Likewise, in several circuits judicial review of constitutional challenges to Agency regulations and procedures, allegations that the Agency exceeded statutory authority in the promulgation of regulations, and other challenges involving matters of general applicability has also occurred. We do not assert that section 211(a) insulates every VA action from the scrutiny of Federal courts. We do assert that section 211(a) should continue to preclude judicial readjudication of individual benefit decisions. (Section III, Appendix).

Another relevant factor that should be considered in assessing the need for judicial review of individual benefit decisions is that there is nothing to indicate that the current preclusion of judicial review results in injustice. To the contrary, as noted in the Committee's report on S. 349, 97th Congress, there is no evidence that most VA claimants are not satisfied with the resolution of their claims for benefits. S. Rep. No. 97-466, 97th Cong., 2d Sess. 24 (1982).

Likewise, the constitutionality of 38 U.S.C. § 211(a) has been consistently upheld by the courts, and we are unaware of any due process guarantee that mandates a right to judicial review. Rather, our research confirms the continued viability of the principle that Congress, when it creates rights in individuals against the Government, is under no obligation to provide a judicial remedy. It may instead provide only an administrative remedy. (Section IV, Appendix).

Accordingly, the issue is not one of constitutionality but of preference. The Social Security Administration's experience with judicial review of Social Security determinations as provided under the Social Security Act demonstrates that judicial involvement in administrative benefit determinations does not have a positive effect on the administration of the program. Given this background, the VA is unwilling to endorse any proposal which would create a system analogous to that involving the review of Social Security claims. (Section V, Appendix).

Although 38 U. S. C. § 211(a) may be the most visible and widely discussed statute precluding judicial review of administrative action, such statutes are relatively common throughout the Federal government, and continue to be enforced in a variety of situations. The Administrative Conference of the United States has identified some forty examples of statutes precluding or restricting judicial review of administrative action. Of course, many of these statutes address specific issues that are by no means analogous to those that arise in the VA, and some provide an opportunity for review under limited circumstances. The fact remains, however, that judicial review is precluded or

severely restricted in such important areas as: Federal employee disability compensation; selective service classification and processing; grant, denial, and revocation of parole; exclusion orders affecting arriving aliens; and determinations controlling coverage of states and localities under the Voting Rights Act. (Section IV, Appendix).

Contributing to the problems inherent in judicial review of VA benefit decisions is the difficulty in defining an appropriate standard of review. (Section VI, Appendix). The rational basis standard mandated in this bill is an untested concept which will have to be defined through litigation and may be subject to differing interpretations among various jurisdictions. The continued presence in the bill of an arbitrary and capricious standard for review of VA decisions may superimpose this nebulous concept as an alternative standard when Agency decisions involve mixed factual and legal issues such as sufficiency of the evidence relating to a factual matter. Although this Committee noted the difficulty in distinguishing such issues in its report on S. 349, supra at page 42, the scope of review provisions of the bill continue to require the courts to differentiate such issues in determining the appropriate standard of review to be applied. (Section VII, Appendix).

Further, we believe that judicial review of administrative determinations involving factual issues is particularly inappropriate and unnecessary in the case of the VA, in view of the Agency's liberal policy of assisting claimants in establishing entitlement to all benefits for which they are eligible under law. Moreover, the importance of judicial review of administrative fact determinations is substantially reduced by the governing principle in VA proceedings that the benefit of the doubt is to be resolved in favor of the claimant. The recognized uncertainty surrounding the various standards of factual review, see K. Davis, Administrative Law of the Seventies § 29.00 (1976), and the tendency of the Federal judiciary to expand its jurisdiction through expansive reading of jurisdictional statutes leads us to conclude

that judicial review of VA findings of fact is inadvisable. For all of these reasons, we believe that any attempt to provide judicial review of VA factual determinations regarding benefit claims would be subject to expansive interpretation by the courts and would endanger the proper functioning of the Agency's administrative process, a process that most interested parties agree has provided substantial justice and fair treatment to veterans.

With regard to the remaining provisions of the bill, we note that many of the adjudicatory procedures included in title I merely restate existing agency practices, while others are clearly intended to complement the provisions concerning judicial review contained in title III. Some are administratively burdensome or expensive, without the prospect of worthwhile results from their implementation. One provision, to increase the size of the BVA to 65 members, is inadequate to accomplish its intended purpose of allowing timely appellate consideration and enhancing the Board's ability to handle the increased workload which would result from judicial review. In our view, this title is unnecessary in the absence of judicial review and we thus recommend against its adoption. A detailed description of our views on the specific provisions of title I is included in the enclosed section-by-section analysis.

We note that title II of the bill, requiring the VA to comply with the notice and comment provisions of 5 U.S.C. § 553 in Agency rulemaking, parallels the procedure already in use by the VA for benefits regulations. Therefore, the section is unnecessary to achieve this purpose. Further, the section is overbroad in its effects. A more detailed discussion of the section's potential impact is included in the section-by-section analysis.

Finally, we are not prepared to support the significant modifications to the present statutory attorney fee limitation, 38 U.S.C. § 3404, that would occur under title IV of this bill. A detailed description of our views on the specific provisions of title IV is included in the enclosed section-by-section analysis.

In summary, it is the VA's position that the present system of informal adjudication of claims for veteran benefits is working efficiently and fairly, and that no widespread injustice has resulted from this system. In view of this record, we believe the potential costs and burdens associated with judicial involvement in the day-to-day process of claim adjudication have not been adequately justified. The remaining provisions of the bill are largely dependent on the adoption of judicial review of individual VA benefit decisions and are unnecessary in the absence of such review. For these reasons, we oppose passage of S. 636.

It is difficult to predict the number of dissatisfied VA claimants who may decide to appeal to the courts. Based upon the current workload, and using the Social Security system rate of appeals as a model, however, it may be anticipated that approximately 4100 veteran cases would be filed annually in Federal courts. We are unable to estimate either the costs of the increased caseload on the court system or the cost to the Department of Justice to litigate these cases.

It is estimated that the cost to the VA of enactment of S. 636 would be as follows:

FISCAL YEAR	COST (000's)
1984	$9,815.7
1985	9,566.1
1986	8,704.1
1987	8,766.1
1988	8,827.1

These costs do not include any payments of attorney fees that may be awarded pursuant to the authority of the new subsection (h) of 38 U.S.C. § 3404. We are unable to estimate the cost of this provision since these fees will depend upon the number and size of the claims allowed, and what each individual judge may consider a "reasonable" fee.

In addition, these costs do not include estimated benefit costs, which would be less than $1 million each year. A detailed explanation of the costs that would result from enactment of S. 636 is provided in Section VIII of the Appendix.

Advice has been received from the Office of Management and Budget that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

HARRY W. WALTERS
Administrator

CONCURRENCE: See attached 3230's for concurrence

	(024)	(01)	(20)		(04)	
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SECTION-BY-SECTION ANALYSIS AND COMMENTARY
TITLE I -- ADJUDICATION PROCEDURES

Section 101: Would amend chapter 51 of title 38, United States Code, relating to applications, effective dates, and payments, to add a new section 3007 entitled "Burden of proof; benefit of the doubt."

Subsection (a) of new section 3007: Would require a claimant to submit evidence in support of his or her claim sufficient to justify a belief by a fair and impartial individual that the claim is well grounded and would require the Administrator to assist a claimant in developing the facts pertinent to the claim.

These procedural requirements, including the low threshold standard of proof required to support a claim, are currently set forth in VA regulations (38 C.F.R. §§ 3.102, 3.103 (a)). Codification would not occasion a departure from our current adjudication procedures.

Subsection (b) of new section 3007: Would provide for a rule to govern situations in which the evidence of record for and against the merits of a material issue is in approximate balance. Under the rule, the "benefit of the doubt" would be given to the claimant on any such issue, not to be construed as affecting the claimant's burden of submitting evidence.

We have no objection to this provision to the extent it would codify, under a different name, the "reasonable doubt" doctrine now set forth in 38 C.F.R. § 3.102. Under this doctrine, a close question is resolved in favor of a claimant when the evidence of record does not satisfactorily prove or disprove the point at issue and there is therefore, a "reasonable doubt" concerning service connection, degree of disability, or any other issue. We note the term "benefit of the doubt" would tend to avoid confusion with the evidentiary standard "beyond a reasonable doubt" employed in criminal law. We do not believe this provision would have any effect on our procedures.

An additional component of the VA's regulation is missing from the bill--a requirement that the finding to be proved be one within the range of probability and not "pure speculation" or a "remote possibility." Without this qualification, the bill's provision could result in allowance of inappropriate claims.

For example, differences of opinion between physicians as to the proper interpretation of medical findings or case histories are common. Similarly, many differences of opinion arise because the physician or physicians supporting one side of an issue do so on the basis of a theory not generally recognized or supported by the medical profession. In a case involving this type of difference of medical opinion, in spite of an appearance of an approximate balance of positive and negative evidence, the VA should not be required to allow the claim.

Section 102: Would amend section 3311 of title 38, relating to the Administrator's authority to issue subpenas, in order to provide that properly authorized subpenas may be served either by personal delivery or by registered or certified mail.

Apparently, this provision is intended to conform VA subpena authority to similar provisions in the Social Security Act (section 205(d); 42 U.S.C. § 405(d)). We have no objection to this addition.

Section 103: Would amend section 4001 of title 38, relating to the composition of the Board of Veterans Appeals.

Clause (1) of section 103: Would amend subsection (a) of section 4001 to increase, from 50 to 65, the maximum number of Board members, to redesignate associate members as members, and to impose a directive that the Board shall consist of sufficient personnel (Board members up to the limitation plus support staff), to carry out its duties in a timely manner.

We observe that enlargement of the Board's membership is intended to "ease existing strains on the BVA's docket" as well as to enhance the Board's ability to handle the increased workload contemplated as a result of the enactment of judicial review. S. Rep. No. 97-466 at 66.

However, based on the Board's current backlog and the anticipated increase in its workload, we conclude that the addition of only 15 Board members would be insufficient to permit the Board to carry out its duties in a timely manner. We estimate, based on present workload projections, that a minimum of 85 members (27 three-member sections plus four Deputy Vice Chairman) would be required.

Clause (2) of section 103: Would add a new subsection (c) to section 4001 requiring the BVA Chairman to report annually to the Committees, beginning not later than October 1, 1983, on the previous fiscal year experience with respect to such matters as the number of cases appealed, the number of cases pending at the beginning and end of the fiscal year, the average length of time from the filing of the appeal to the disposition, and the like, together with projections for the current and subsequent fiscal years. In addition, the Board would be required to submit information and projections as to the number of its personnel (Board members plus support staff) and an evaluation of its ability, within staff constraints, to ensure timely disposition of appeals.

Although there is, obviously, some relationship between the Board's ability to dispose of its cases in a timely manner and the number of members and support staff, we suggest that many other factors are present, including the complexity and number of the issues involved, delays occasioned by claimants and claimants' representatives, and field delays that are beyond the Board's control. In our view, the imposition of a timeliness standard to be evaluated only against the number of Board personnel is seriously deficient and could result in greater expenditure without any significant effect on the fairness and timeliness of outcomes.

Section 104: Would amend section 4002 of title 38, relating to the assignment of Board members, to make conforming changes necessitated by the redesignation of "associate members" as "members" in section 103(1).

Section 105: Would amend section 4003 of title 38, relating to determinations by the Board, to impose a notice-and-hearing requirements in certain types of determinations. Under section 4003, a Board section's determination, whether unanimous or the result of the Chairman's concurrence with the majority, may be reversed on the basis of official information from the concerned service department. This provision would require notice to the claimant of such additional information and the opportunity for a hearing in connection therewith, prior to any redetermination on the basis of the additional information.

This provision reflects our current procedures in such situations, except that we do not consider it necessary to notify the claimant of such additional information when it favors the claimant or its consideration would result in a favorable decision.

Section 106: Would amend section 4004, relating to the Board's jurisdiction.

Clause (1)(A) of section 106: Would amend section 4004(a) to modify the Board's authority to review questions on claims "involving" benefits by providing authority to review questions on claims "for" benefits.

In our view, this would unduly restrict the Board's jurisdiction; claims "involving" benefits is a broader term than claims "for" benefits. Accordingly, we object to this change.

Clause (1)(B) of section 106: Would amend section 4004(a) to codify the regulatory requirement, found in 38 C.F.R. § 19.157(a), that final decisions on appeals heard by the Board shall be made only after affording the claimant an opportunity for a hearing and exclusively on the basis of the evidence and material of record and applicable law and regulations.

We have no objection to this codification. As a technical matter, we suggest that the term "evidence and material of record" is redundant, and, to avoid confusion, we suggest that a reference to "regulations" be added after the reference to "law".

Clause (2) of section 106: Would amend section 4004(b) to modify the circumstances under which the Board may reopen and allow a previously disallowed claim on the basis of new and material evidence.

Paragraph (1) of new subsection (b) of section 4004: Would continue the present prohibition against the reopening of previously disallowed claims, subject to exceptions set forth in paragraph (2).

The Board operates solely as an appellate body and a determination by the agency of original jurisdiction is first required. 38 C.F.R. § 19.5. Initial consideration of the merits of a reopened claim by the agency of original jurisdiction may permit resolution of the controversy without appellate action. This existing procedure helps to maintain the Board's workload at a relatively manageable level. Accordingly, we object to a provision which would encourage the filing of petitions to reopen a claim with the BVA and believe that the words "directly or" should be omitted from new paragraph 4004(b)(2).

Paragraph (2) of new subsection (b) of section 4004: Would require the reopening of a disallowed claim when new and material evidence is presented and authorize such reopening for good cause shown. We observe that the question as to whether particular items of evidence are new and material would properly remain within the Board's discretion.

We believe the inclusion of a "good cause shown" standard is unnecessary and invites controversy as to its meaning and application. The VA has a liberal policy with respect to permitting individuals to reopen claims on the basis of new and material evidence. Absent new and material evidence, a claimant may request reopening of a prior Board decision on the basis of obvious error or administrative allowance on the basis of difference of opinion. 38 C.F.R. § 19.5. We do not believe that there should be any basis, other than those just described, to justify reopening a final decision. Accordingly, we believe the authority to reopen on the basis of "good cause shown" should be eliminated.

Although the proposed enlargement of the Board's jurisdiction appears to be intended to correspond with the Board's present practice, it would undermine a critical distinction. Currently, the thrust of section 4004(b) is that all service records are considered as constructively in the VA's possession regardless of when they are received. If the actual receipt of such records permits a decision favorable to the claimant, the effective date relates back to the date of claim or date of discharge as appropriate. When the Board permits reopening on the basis of new and material evidence other than service records and the claim is allowed on the new factual basis, benefits are payable from an appropriate effective date governed by the new decision.

We believe this distinction should be preserved and accordingly oppose this formulation of the Board's jurisdiction.

Paragraph (3) of new subsection (b) of section 4004: Would clarify that a judicial decision made possible by the proposed amendments in title III of the bill, if favorable to the Government, would not affect the Board's ability to review a disallowance on the basis of new and material evidence or for good cause shown. We have no objection.

Clause (3) of section 106: Would amend section 4004(d) to require the Board to mail prompt notice of its decision in a case to the claimant and claimant's representative, at their last known addresses. This provision would also require each decision to be in writing and to include the Board's findings and conclusions and supporting reasons, on all material issues of fact, law, and "matters of discretion" presented by the record, as well as an order granting appropriate relief or denying relief. We have

no objection to this provision, which would codify the Board's present practice. We observe that the term "matter of discretion" would include, for example, the Board's determination not to request an independent medical opinion. For purposes of clarity, we suggest the following formulation: "All material issues of fact and law and discretionary determinations presented by the record."

We observe also that the Board occasionally remands a case to the field rather than granting or denying the relief sought. When this is done, notice is given to the claimant and claimant's representative, but the Board's remand decision is, of course, not final. In our view, the term "appropriate relief" would include the Board's remand decision.

Section 107: Would amend section 4005 of title 38, relating to the filing of the notice of disagreement and appeal, to make a conforming change necessitated by the amendment of section 4004, supra.

Section 108: Would amend section 4009, relating to independent medical opinions, by adding a new subsection (c).

New subsection (c) of section 4009: Would add to the Board's existing authority to secure an independent advisory medical opinion if warranted by the medical complexity or controversy of a particular case. Under this provision, the Board would be required to secure an Independent Medical Expert (IME) opinion if the claimant so requests and the record discloses a "substantial disagreement" on a material issue between two physicians' "substantiated findings or opinions." Should the Board deny the claimant's IME request, it would be required to state its reasons in writing; the Board's decisions under this new provision would not be subject to judicial review.

In our view, notwithstanding the safeguard against judicial review of Board decisions in such cases, the enactment of this provision would very likely significantly increase the number of IME requests and, therefore, the number of IME's. Currently, the Board obtains about 200 IME's annually. Seventy-three medical schools now participate in the IME program, in which cases are referred to the schools for evaluation by school-designated medical specialists. We must assume a marked increase in this number should the new

subsection be enacted; no conscientious representative would wish to overlook any possible resource, and one may safely predict that the number of IME's would track the number of IME's requested by claimants and their representatives.

Under this provision, any such request would have to be premised on a disagreement between two physicians. To the extent that a claimant would have to bear the expense of securing a private physician's "substantiated findings," we suggest that this provision would lead to higher medical expenses for many claimants without any concomitant enhancement of the likelihood of a favorable outcome. The increased number of IME opinions could not be handled by our present IME program, and new sources of expert medical opinion would have to be developed. The cost to the Federal Government of this type of provision should not be overlooked. Conceivably, this provision would lend itself to abuse as centers of medical opinion begin to compete for the business of providing IME's.

Therefore, while we would not object to a reasonable expansion of the Board's capacity to request IME opinions, we believe this provision would result in unduly higher costs not only for the Federal Government but also for claimants, with the potential for creating unwarranted delays in appeal dispositions and stimulating unnecessary controversies within the medical community.

Section 109: Would amend chapter 71 of title 38, relating to the Board generally, to add a new section 4010, to be entitled "Adjudication Procedures," and a new section 4011, to be entitled "Notice of Procedural Rights."

New section 4010: Would codify certain procedures currently found in VA regulations and add certain new requirements to the procedures to be followed by the Board of Veterans Appeals.

Subsection (a) of new section 4010: Would provide statutory authority to administer oaths and affirmations, examine witnesses, and receive evidence, in connection with a hearing, investigation, or other proceeding in the course of consideration of a claim for VA benefits. This would have the effect of codifying present VA practice and is similar to statutory authority granted to the Social Security Administration under section 205(b) of the Social Security Act (42 U.S.C. § 405(b)). We have no objection.

Subsection (b) of new section 4010: Would clarify that any type of evidence, written or oral, is admissible in a VA claim proceeding even though inadmissible in court under the rules of evidence, subject to regulations to be prescribed for the exclusion of irrelevant or unduly repetitious evidence. This would essentially codify 38 C.F.R. § 19.157(c), and we have no objection.

Subsection (c)(1) of new section 4010: Would require the Board, in the course of any proceeding before it, to afford to any party to the proceeding, or party's representative, certain opportunities.

Clause (A) of subsection (c)(1): Would enable a claimant to examine, before and during the proceeding, the case files and all documents and records used by the VA at the proceeding and to obtain copies thereof, on payment of a fee not to exceed the direct cost of duplication.

We agree that a claimant has, and should have, the legal right to access to his or her claim file during the course of the claim. Under current information law (Freedom of Information Act, Privacy Act), copies need not be furnished when the records are made available to the claimant or representative. To require the Agency to provide both access to and copies of the record would be unnecessarily burdensome and costly. It is anomalous that, under new subsection 4025(d), the Agency is permitted to furnish a court a complete index of the record when the cost of filing copies is unduly expensive, but cannot avoid copying requirements under subsection 4010(b) for administrative claims. We believe that copying should be required only if access to the record cannot be provided.

Clause (B): Would enable a claimant to present witnesses and evidence, subject to regulatory restrictions regarding relevance and undue repetition. We have no objection to this codification of our present practice.

Clause (C): Would enable a claimant to present oral argument and written contentions on substantive and procedural issues. We have no objection; however, we observe that this opportunity would be afforded only "during the proceedings." We suggest that written contentions could be presented within a reasonable time after such proceedings are formally closed, i.e. after the hearing.

Clause (D): Would enable a claimant to present rebuttal evidence. We have no objection.

Clause (E): Would enable a claimant to present medical evidence and request an IME opinion as would be authorized under the proposed amendment to section 4009 of title 38. We have no objection other than our previously stated disapproval of an undue expansion of IME authority.

Clause (F): Would enable a claimant to serve written interrogatories on any person, including a VA employee, which must be answered "separately and fully in writing and under oath" unless the person objects in a writing filed with the Administrator. We strenuously object to this provision and discuss our objection at greater length below.

Subsection (c)(2) of new section 4010: Would grant authority to the Administrator, under regulations to be prescribed, to waive the duplication fee on the basis of inability to pay or for other good cause shown. We have no objection.

Subsection (c)(3) and (4) of new section 4010: Would set forth procedures to be followed in the event an objection to interrogatories is filed or there is a failure to respond or a failure to provide responsive answers. Under paragraph (3), the VA, under regulations to be prescribed that are consistent with standards for Federal-court protective orders, would be required to evaluate an objection and then either direct a response within a time certain or indicate that no response is necessary. Under paragraph (4), for failure to answer or failure to answer responsively, the VA would be required, upon a showing of "general relevance and reasonable scope," to issue a subpena for the proposed witness' deposition on written questions. The subpena would be enforceable by resort to Federal court contempt proceedings pursuant to section 3313 of title 38, and the deposition would be required to be held within 100 miles of the witness' home or place of employment or business.

These complex, burdensome provisions are apparently intended to furnish additional means to claimants seeking to gather evidence. We currently have the authority under sections 3311 to compel the production of evidence on the claimant's behalf. The interjection of burdensome procedural routines into our non-adversary proceedings is inconsistent and unnecessary. The VA would be forced into the role of enforcer, and unnecessary criticism and controversy, not to mention paperwork and expenditures, would result with no assurance of a corresponding benefit to our claimants.

Subsection (d) of new section 4010: Would enable a VA employee to disqualify himself or herself, for personal bias "or other cause," from adjudicating a claim; the Administrator would be authorized to "determine the matter" on the basis of a good-faith affidavit from a party averring personal bias or other disqualifying cause. In this situation, the Administrator would, in a proper case, take steps to remove a biased employee from a case.

We do not object, in principle, to the disqualification of hearing officers or adjudicative personnel if personal bias or other cause is substantiated either by the employee's admission or other credible evidence. We observe that 38 C.F.R. § 19.183 currently provides for the disqualification of BVA members, and we informally permit such disqualification in the case of hearing officers and adjudication personnel for good cause.

Subsection (e) of new section 4010: Would define the "record for decision," referred to in section 4004(a) of title 38, as consisting of the transcript or recording of testimony, exhibits, all papers and requests filed in the proceeding, and the Board's decision. The record for decision would be available for inspection and copying by a party or party representative, subject to a waivable fee that does not exceed the cost of duplication. We have no objection to this codification of our current practice, except to again note our objection to providing copies when access to the records is available.

Subsection (f) of new section 4010: Would clarify that title 38 procedures and VA regulations exclusively govern VA claims adjudication and hearings, regardless of any provision in section 4004(a) of title 38; section 554(a) of title 5, United States Code; or other provision of law. We have no objection. As a technical matter, we note the ambiguity that would be created by an override of section 4004(a) of title 38.

New section 4011, to be entitled "Notice of Procedural Rights," would provide for a notice requirement in the case of a disallowance in whole or in part of a VA claim. Under this provision, written notice of procedural rights would be required "at each procedural stage" in easily understandable

language. Any such notice would be required to include descriptions of subsequent procedural stages, available rights, and procedures necessary to secure review.

We currently provide detailed notice of procedural rights at relevant stages of the adjudication process. A mandate to furnish individualized notice at every procedural stage is unduly burdensome and could create confusion among claimants. We object to this provision to the extent that it is intended to require us to furnish individualized, duplicative notices that go far beyond adequacy and fairness.

Section 110: Would authorize the VA to evaluate the feasibility and desirability of modifying the VA appellate procedures with a view toward enhancing the Board's efficiency, timeliness, and fairness. This evaluation would be accomplished on the basis of a study to be carried out over two years. Two pilot programs would be authorized, and the VA could establish one or both. Each would operate separately in not more than three regions.

The first pilot program would set up an intermediate level of adjudicatory-appellate review. This would consist of de novo findings at the Regional Office level by adjudication personnel not previously involved with the claim. If the claimant remains dissatisfied with the panel's decision, the panel would prepare the statement of the case for purposes of BVA review.

This could have the effect of reducing the Board's docket for two reasons--decisions favorable to claimants would not be appealed, and some claimants would not wish to pursue a further appellate remedy. However, whether any such result would actually occur must be regarded as speculative. This project is likely to increase overall case processing times, with attendant costs, and have little or no effect on ultimate outcomes.

The second pilot program would require an enhanced schedule of "traveling board" panels, on at least a quarterly basis, for the purpose of increasing the number of field hearings within the regions encompassed by this pilot program. The idea that increasing the number of traveling Board hearings

would "enhance fairness" is, apparently, based on statistics indicating higher allowance rates in Board decisions based on field hearings before a traveling Board panel, as opposed to decisions based on hearings before the Board in Washington, D.C.

We do not consider either of the proposed pilot programs as adequate for the purpose intended. We value efficiency, timeliness, and fairness as objectives always to be sought and never to be discounted. However, inserting a duplicative "second look" adjudication procedure would have no effect on the Board's efficiency or fairness. Any positive effect on timeliness would have to come from a possible reduction in the docket, a reduction that could be achieved only if the "second look" procedure significantly increased the number of claimant-favorable outcomes. We regard this as improbable, in view of the high degree of quality and consistency we have achieved in our regional office decision-making procedures.

Increasing the number of travel board hearings would have little effect in reducing the number of hearings in Washington, D.C. It is expected that the number of hearings generally would increase leaving fewer Board members available in Central Office to review cases. Because cases with hearings require additional processing, overall response time would be increased.

We regard the premise--that fairness, timeliness, and efficiency would be improved by increasing the number of local hearings--as based on sheer conjecture. Although it is currently true that local hearings statistically yield more claimant-favorable outcomes, we believe the reason is more closely attuned to the type of case than to the place of the hearing: in our experience, claimants' representatives often advise claimants to request local hearings when the claim is believed to be particularly meritorious because in this way the representative may receive the personal and professional satisfaction that is derived from successful "portal to portal" advocacy.

For these reasons, we oppose the BVA study requirement to the extent required to be based on data to be derived from the proposed pilot programs.

TITLE II -- VETERANS ADMINISTRATION RULEMAKING

Section 201: Would amend chapter 3 of title 38 relating to various administrative matters pertaining to the VA by adding a new section 221 entitled Rulemaking.

New Section 221: Would provide that the VA's rulemaking procedures must comply with the provisions of 5 U.S.C. § 553 notwithstanding the exemption in subsection (a) of that section of matters pertaining to "agency management or personnel or to public property, loans, grants, benefits, or contracts."

With respect to benefit-related regulations, it should be observed that the Agency has voluntarily been in substantial compliance with the requirements of section 553 since April 1972. At that time, a regulation, 38 C.F.R. § 1.12, was promulgated which requires notice of regulatory changes to be published in the Federal Register in accordance with the provisions of the APA. This regulation is binding on all elements of the VA.

Therefore, it is our current practice to publish proposed benefit regulations in the Federal Register in advance of their effective date, offer the public opportunity for comment, and publish our final version of the regulations with a summary of the comments received and the reasons they were or were not accepted. In view of our voluntary compliance, the section is simply unnecessary.

As a technical matter, however, title II would effect not only a waiver of the exemptions for loans, grants, and benefits, but would also end the exemption now embodied in subsection (a)(2) of section 553 for rules relating to "agency management or personnel." We strongly support the position that Agency management and personnel matters should be exempt from the rule making requirements of section 553. VA and other Federal agency personnel matters involve a vast range of issues, such as leave, hours of employment, conduct requirements, clothing requirements, etc., in which the public has little or no interest. In many instances, such matters are already the subject of participatory decision making in the form of collective bargaining.

Congress has had opportunities to modify the exemption provisions over the years. In fact, several bills to accomplish this were before the last Congress. The basic provision, however, has remained unchanged since enactment of the Administrative Procedure Act in 1946. We question the need to single out the VA on this issue when we have already waived our right to claim the exemption through our regulation in those areas in which the veteran public has a true interest.

TITLE III--JUDICIAL REVIEW

Section 301: Would amend section 211(a) of title 38, the existing preclusion of review statute governing decisions of the Administrator of Veterans Affairs, by adding a new exception for matters reviewable under proposed subchapter II, chapter 71 of title 38. This provision would permit, within specified limitations, judicial review of final decisions of the Administrator involving claims for benefits. As discussed more fully elsewhere in this report, we consider such review unnecessary and unjustified.

Section 302(a): Would amend chapter 71 of title 38, relating to the Board of Veterans Appeals, by adding a new subchapter II entitled "Judicial Review." In comments to the Committee on previous legislative proposals for judicial review of VA decisionmaking, we stressed that any such legislation should be specifically tailored to the VA and codified in title 38 of the United States Code. Proposed section 302 satisfies this recommendation.

New section 4025: Would amend chapter 71 of title 38, to provide a right to judicial review of adverse final decisions of the Administrator of Veterans Affairs in matters involving claims for benefits.

Subsection (a)(1) of new section 4025: Would define the term "final decision of the Administrator" for purposes of judicial review. The term would be defined in reference to final determinations and dismissals by the Board of Veterans' Appeals. We commented to the Committee in connection with previous judicial review proposals that claimants should be required to exhaust all available remedies, including appeals to the BVA, prior to bringing suit in Federal court. This objective would be accomplished by the proposed definition, together with new subsection 4025(b) permitting review only of any "final decision of the Administrator."

Subsection (a)(2) of new section 4025: Would define the term "claim for benefits" for purposes of judicial review. The term would be defined to include initial benefits claims, challenges to reductions, suspensions, and terminations of benefits, and requests for reopening, reconsideration, or further consideration of such claims or challenges.

With regard to use of the term "claim for benefits" in judicial review legislation, we expressed concern in the past that such usage could resurrect a problem of interpretation associated with the former language of 38 U.S.C. § 211(a). The U.S. Court of Appeals seized upon that term as a means of narrowing the statute's nonreviewability mandate by interpreting the term to include only original claims for benefits. E.g., Tracy v. Gleason, 379 F.2d 469 (D.C. Cir. 1967). This interpreation required legislative action to clarify the meaning of the statute by removal of the controversial term. This potential problem has been avoided by definition of the term "claim for benefits" in the proposed bill.

Subsection (b) of new section 4025: Would permit a claimant for veterans' benefits to bring a civil action in a United States district court for review of a final decision of the Administrator of Veterans Affairs adverse to the claimant involving a claim for benefits. The claimant would be required to file the civil action authorized by this provision within 180 days after mailing to the claimant notice of the decision in question. We are opposed to the grant of district court jurisdiction to review VA benefits determinations.

Regarding the specific provisions of proposed section 4025(b), it is our position that the 180-day period permitted between notice of final BVA action and filing of a complaint seeking judicial review is too long. By the time a claim has progressed through regional office review to the BVA and has been decided de novo by that body, the issues in dispute will certainly have crystallized. In the interest of expeditious handling both in the Agency and the courts, we believe a 60-day limit on the right to bring an action would be sufficient. It is significant that the law pertaining to judicial review of Social Security decisions provides a 60-day period for bringing suit.

Further, the venue provision of proposed section 4025(b) would permit commencement of an action not only where the plaintiff lives or maintains a business, but also where the BVA has its principal offices. This provision could result in a disproportionate case-load on the U.S. District Court for the District of Columbia.

Subsection (c) of new section 4025: Would require that a complaint initiating an action challenging a VA decision contain sufficient information to permit the Agency to identify and locate the plaintiff's records in its custody. In its report on S.349 in the 97th Congress, the Committee included in its section-by-section analysis of the bill an explanation that such information might consist of the date of the final BVA decision in question, and the claimant's VA claim number.

S. Rep. No. 97-466, 97th Cong., 2d Sess. 74 (1982). In the interest of clarity and administrative efficiency, we suggest that this explanatory language be made a part of any judicial review legislation approved by the Committee. At minimum, we suggest inclusion of an explanation of the term "sufficient information" in the legislative history of the measure.

Subsection (d) of new section 4025: Would require the Administrator of Veterans Affairs to file, together with answer to a complaint filed pursuant to this proposed new section, a certified copy of the records upon which the decision complained of is based, or if such filing would be unduly expensive, an index of materials permitting the court to select particular items in the record to be certified. While we do not object to the requirement for filing with the court a certified copy of the administrative record, we do not believe that such filing need accompany the Government's answer.

Since, as a practical matter, the same personnel who prepare the Government's answer will be responsible for reviewing the completeness and accuracy of the documents to be filed, concurrent review of the record may in some cases prejudice the Government's ability to timely answer the allegations in the claimant's complaint. A requirement that a certified copy of the records or an index be filed within 60 days of the filing of the answer would protect the Government's interest while not unduly delaying the proceeding. We suggest that subsection 4025(d) be so modified.

Subsection (e) of new section 4025: Would authorize the court to enter judgment in or remand a case brought under this section upon the pleadings and the administrative record. In the context of the bill, we have no objection to this provision.

Subsection (f)(1) of new section 4025: Would preclude the filing of an action under this section where the initial claim for benefits is filed after the last day of the fifth fiscal year beginning after the effective date of the section. We support the inclusion of a sunset provision in this legislation. However, we are concerned that the term "initial claim for benefits" may be interpreted to permit the filing beyond the five-year sunset period of an action for review of a decision on the reopening or other reconsideration of a claim, so long as the initial claim which is sought to be reopened or reconsidered was filed within the five-year period. We recommend that the words "where the initial claim for benefits is filed pursuant to section 3001 of this title" be deleted from this subsection.

Subsection (f)(2) of new section 4025: Would preclude the filing of an action under this section with respect to matters arising under chapters 19 and 37 of title 38, relating to insurance and loan guaranty, respectively. We requested in comments on prior proposals that any new judicial review legislation not affect VA programs, i.e., insurance and loan guaranty, which are already subject to judicial review. We believe that proposed subsection 4025(f)(2) accomplishes this objective.

Subsection 4026: Would amend chapter 71 of title 38, to define the scope of judicial review of decisions of the Administrator of Veterans Affairs regarding claims for benefits.

Subsection (a)(1) of new section 4026: Would authorize a reviewing court to decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an action of the Administrator of Veterans Affairs. As discussed more fully in the enclosed appendix to this report (Section VII, Appendix), we are concerned that the language of this subsection may create confusion and judicial inconsistency in the handling of mixed questions of law and fact, particularly those involving the application of statutory or regulatory provisions to the facts of a particular case, and the drawing of legal conclusions from the facts. In our view, the present wording of this subsection invites unlimited judicial review of such questions. We suggest that this subsection be modified to limit review to interpretation of constitutional, statutory, and regulatory provisions, and to clarify that mixed questions of law and fact are outside the scope of the subsection.

Subsection (a)(2) of new section 4026: Would authorize a reviewing court to compel action of the Administrator of Veterans' Affairs which hasbeen unlawfully withheld. We have no objection to this provision in the context of the bill.

Subsection (a)(3) of new section 4026: Would authorize a reviewing court to set aside decisions, findings, and conclusions of the Administrator of Veterans Affairs found to be arbitrary and capricious, contrary to constitutional prescription , in excess of statutory limitations, or in violation of required procedures. This subsection complements subsection 4026(a)(1) which empowers the courts to interpret constitutional and statutory provisions.

As discussed at length in the enclosed appendix to this report (Section VI, Appendix), the inclusion in this subsection of an arbitrary and capricious test applicable to VA decisions, findings and conclusions raises the prospect that this nebulous concept may be superimposed on judicial review of Agency determinations as otherwise defined in proposed section 4026. We object to this provision of the bill.

Subsection (a)(4) of new section 4026: Would authorize a reviewing court to set aside a finding of material fact made in reaching a decision on a claim for VA benefits, when the finding is so utterly lacking in a rational basis in the evidence that a manifest and grievous injustice would result if the finding were not set aside. This subsection further provides that, before setting aside a finding of fact, a court shall remand the case one time to the Agency for corrective action.

The enclosed appendix to this report (Section VI, Appendix) provides a full discussion of our concern that no standard of review of factual findings, including the rational basis standard specified in this subsection, can adequately protect against unwarranted judicial intervention in the administrative adjudication of veterans' claims. To prevent such intrusion, we recommend strongly that judicial review of VA findings of fact be eliminated from the bill. Should the Committee consider some such review essential, we urge that this subsection be modified to clarify that mixed questions of law and fact, in particular so-called findings of ultimate fact, are to be reviewed under the more narrow standard of review applicable to factual matters.

Subsection (b) of new section 4026: Would provide that judicial review of VA determinations be made on the basis that the whole administrative record before the court is subject to review and that the court will review those portions of the record cited by a party. This subsection also calls application of the rule of prejudicial error in the judicial review process.

In the past, we recommended to the Committee that any judicial review of Agency factual determinations be limited to review the administrative record of the claim. The proposed new subsection satisfies this recommendation. Moreover, we consider the rule of prejudicial error a necessary component of any judicial review procedure. We thus have no objection to inclusion of this provision in the bill.

Subsection (c) of new section 4026: Would provide that in no event shall findings of fact by the Administrator of Veterans Affairs be subject to trial de novo by a reviewing court. We continue our longstanding opposition to any de novo review of VA fact-finding as an inefficient and unnecessary judicial usurpation of the adminstrative function. For this reason, we have no objection to this provision of the bill. However, we note the willingness of judges in Social Security cases to disregard statutory limitations and substitute their judgment on factual issues for that of administrative decisionmakers. We caution that this subsection may not be an adequate safeguard against expansion of the judicial role in the VA adjudication process.

Subsection (d) of new section 4026: Would provide that where the sole stated basis of a decision of the Administrator of Veterans Affairs adverse to a party is the failure of the party to comply with any applicable VA regulation, judicial review of the decision will be limited to questions concerning compliance with and the validity of the regulation. In our view, review of factual issues and mixed questions of law and fact is inherent in judicial consideration of compliance with Agency regulations. As discussed elsewhere in this report, we oppose judicial review of Agency factual determinations. We therefore recommend deletion of the words "compliance with and" from this subsection.

New section 4027: Would amend chapter 71 of title 38, to provide for remand to the VA of cases which are the subject of review in the district courts.

Subsection (a)(1) of new section 4027: Would direct a reviewing court to permit a single remand to the VA of a case subject to review under proposed new section 4025, upon motion of the Administrator of Veterans' Affairs made before the expiration of the time specified for filing an answer to the complaint in the action. If the Agency does not complete review of the matter within 90 days of remand, the case would be returned to the court for action. We have no objection to inclusion of this provision in the bill.

Subsection (a)(2) of new section 4027: Would authorize a reviewing court, in its discretion, to remand a case to the VA for further action. This subsection would also permit either party to apply for leave to adduce additional evidence upon a showing of materiality and good cause, and would authorize the court to remand the case to the Agency for taking of additional evidence. The court would specify a reasonable period of time for the taking of such evidence.

We are concerned that, while the bill attempts to narrowly limit the scope of the courts' factual review of administrative decisions, the authority to remand cases merely upon a showing of good cause would invite the remand of cases in which the judge is dissatisfied with the Agency's factual conclusions and favors reconsideration at the administrative level. In our view, such authority may lead to excessive intrusion by the courts into the administrative process. We therefore suggest that this provision be further refined to condition remand on a showing that there is new evidence which is material, and that there is good cause for the failure to produce evidence at the administrative level. The provision in section 106(2) of the bill preserving the Agency's authority to reopen a claim despite a judicial decision adverse to the claimant assures that injustice will not result from the suggested change.

Subsection (b) of new section 4027: Would provide that, in the case of remands under this section, the Administrator of Veterans Affairs shall file with the court any modification, affirmation, or reversal of its original findings or decision and certified copies of any additional records upon which such action is based. Such action of the Administrator would be reviewable by the court to the same extent as other actions within the scope of the judicial review provisions of the bill.

We do not object to this provision to the extent that it provides for review of decisions of the Administrator affirming prior Agency decisions. However, in the interest of judicial and administrative efficiency, we recommend that review of administrative decisions reversing, modifying or supplementing prior decisions be reviewable only on motion of the claimant made within a specified period following issuance of the decision. In the absence of such a motion, the Agency could merely inform the court that the matter had been resolved to the satisfaction of the claimant.

New section 4028: Would provide for the survival of actions notwithstanding any change or vacancy in the office of the Administrator of Veterans Affairs. This section merely restates existing judicial procedure on the subject as contained in Rule 25(d)(1) of the Rules of Civil Procedure. We have no objection to inclusion of this provision in the bill.

New section 4029: Would authorize appellate review in the United States courts of appeals and the United States Supreme Court of district court decisions under chapter 71 of title 38. Such review would be conducted in the same manner as review of judgments in other civil actions. We have no objection to inclusion of this provision in the bill.

Section 302(b): Would amend the table of sections in chapter 71 of title 38 to make conforming changes necessitated by the addition of a new subchapter to that chapter.

Section 303: Would exempt suits filed pursuant to new subchapter II of title 38 from the coverage of 28 U.S.C. § 1346(d), which bars actions against the United States for pensions. Inclusion of this provision resolves our previously expressed concern that judicial review legislation would conflict with the section 1346(d).

TITLE IV--ATTORNEYS' FEES

Section 401: Would amend section 3404 of title 38 to modify the present limitation on the amount an attorney may receive for representing VA claimants before the Agency and to authorize fees for attorneys representing claimants in cases appealed to the courts. This would be accomplished by amending the present subsection (c) and adding five new subsections, (d) through (h). We object to modification of the existing limitations on attorneys' fees on the basis that the informal, nonadversary nature of VA adjudicatory procedures, the liberal standards for granting benefits, and the availability of free representation by trained service organization claims representatives provides a better system for fair and efficient adjudication of claims than one involving paid advocates. We also have reservations, as discussed below, about specific provisions of section 401 of this measure.

New subsection (c) of section 3404: Would amend subsection (c) of section 3404 to authorize the Administrator to approve attorneys' fees above the present $10 maximum for services rendered in representing a claimant within the VA following an initial BVA decision. The $10 maximum would be retained in cases resolved prior to BVA action or upon the initial BVA decision in the case. An attorney's fee for representing a VA claimant after an initial BVA decision would be limited:

(A) to not more than 25% of any past-due benefits if the attorney and claimant have entered into a contingent fee agreement; or

(B) in the absence of a contingent fee agreement, to the lesser of (1) the fee agreed upon by the claimant and the attorney or (2) $500. The $500 limit could be increased administratively for all cases by the Administrator in future years as warranted by changed economic conditions or in an individual case based upon the presence of extraordinary factors in the case warranting a higher fee.

Our concern with new subsection (c) arises in regard to the provision for a fee in excess of $500 in cases involving "extraordinary circumstances." We recognize that such a provision might prevent a few instances of awarding unreasonably low fees in complicated cases. It should also be recognized, however, that the provision presents the very real possibility that a significant number of attorneys will attempt to characterize their cases as involving "extraordinary circumstances" thereby adding a further administrative burden on the VA.

This is particularly true in light of the fact that the Administrator's role with respect to fees in all cases except those involving "extraordinary circumstances" is limited to merely approving a fee under very specific statutory limitations, not actually determining its amount.

Accordingly, we oppose this provision. We suggest that if Congress believes this provision is necessary the statute itself should provide some guidance or standards as to what would constitute "extraordinary circumstances."

New subsection (d) of section 3404: Would authorize a court to determine and approve an attorney's fee in cases appealed to court under the new judicial review subchapter added by this bill. If the case is resolved in a manner favorable to the claimant (as that result is defined in new subsection (g) of section 3404) the court may determine a reasonable fee to be paid by the claimant. This authority is limited only in cases involving contingent-fee agreements where the fee may not exceed 25 per cent of the total amount of past due benefits awarded. Presumably, the court could not determine or approve a fee in a case involving a contingent-fee agreement when its review did not result in an award of past-due benefits.

If the case is not resolved in a manner favorable to the claimant, the court would be authorized to determine a reasonable fee not exceeding $750. In making this determination, the court is to consider the extent to which success appeared reasonably probable when the action was filed.

We are opposed to the provisions of subsection (d) which would grant the court open-ended discretion in setting attorney fees in cases where a contingent-fee agreement is not involved.

In our opinion, such unlimited discretion could be abused and we therefore believe that even if no attorney-client fee agreement is involved, a court should be limited to determining an attorneys fee on the basis of either a definite percentage amount of past-due benefits, for example 25 percent as occurs in Social Security cases, or a specified dollar amount.

New subsection (e) of section 3404: Would authorize the Administrator to pay an attorney directly from any past-due benefits that are awarded by the Administrator or a court. Subsection (e) would specifically preclude the VA from withholding any benefits that become payable after the date of a benefit decision for the purpose of paying an attorney's fee.

We have no objection to this provision.

New subsection (f) of section 3404: Would limit the applicability of the new attorneys' fee provisions of section 3404 to cases involving claims for VA benefits. The provisions of section 3404 would not apply in cases where the VA is the plaintiff or in which other attorney's fee statutes are applicable.

We have no objection to this provision.

New subsection (g) of section 3404: Would provide that, for the purposes of this section, a claim is resolved in a manner favorable to a claimant when all or any of the relief sought is granted. It would also provide that the terms "final decision of the Administrator" and "claim for benefit" shall have the same meaning as in new section 4025.

We have no objection to this provision.

New subsection (h) of section 3404: Would authorize a court in an action brought under the new judicial review subchapter added by this bill to award attorneys' fees and costs to a prevailing party, other than the Administrator, where it finds that the position of the Administrator was not substantially justified or special circumstances make an award just.

We have several misgivings about this new subsection. It is our understanding that new subsection (h) is intended to provide the same standard for a punitive attorney's fee award as is set forth in 28 U.S.C. § 2412(d)(1)(A). (Equal Access To Justice Act). See the Committee's discussion of subsection (h) in S. Rep. No. 97-466, 97th Cong. 2d Sess. 55 (1982).

Initially, in view of the presence of the provisions of 28 U.S.C. § 2412(d)(1)(A), we question the need for an express provision for punitive attorneys' fees specifically intended to cover veteran cases. We realize that section 2412(d)(1)(A) is subject to a sunset provision. We can only assume, however, that Congress will reenact those provisions if the results experienced thereunder demonstrate their value. Likewise, if experience under section 2412(d)(1)(A) demonstrates that awarding attorneys' fees against the United States is not worthwhile in other types of cases, it appears to us that a similar conclusion would be appropriate with respect to such fees in veteran cases.

Moreover, although new subsection (h) is intended to authorize attorney's fee awards against the Government on the same basis as section 2412(d)(1)(A), in fact, subsection (h) provides a significantly less stringent standard. Under section 2412(d)(1)(A), a court is precluded from a punitive award in any case where it "finds that the position of the United States was substantially justified." The punitive award standard in subsection (h), however, would permit a court to award attorneys' fees where special circumstances make an award just, even if the position of the Administrator is substantially justified.

Subsection (h) goes further than section 2412(d)(1)(A) in exposing the United States to liability for attorneys' fees in another respect. Under section 2412(d)(2) an attorney fee may not be awarded in excess of $75 per hour unless the court finds that an increase in the cost of living or another special factor justifies a higher hourly fee. There is no corresponding limitation on the amount a court may award under subsection (h).

If, notwithstanding the objections discussed above, Congress believes that a punitive attorney fee provision specifically for VA benefit cases should be enacted, it is our belief that the Government's liability under any such provision should be limited. In VA benefit cases rather than merely setting a limit on the hourly rate an attorney may receive as occurs under section 2412(d)(1)(A), we believe that the amount of any punitive fee award should be limited to the amount the claimant would have been liable to pay his or her attorney had the court made no such award.

Limiting the Government's liability for attorneys' fees in this manner would accomplish several desired results while protecting public funds from any possible abuse through excessive awards. First, and most importantly, such a limitation would serve the purpose noted on page 55 of Senate Report No. 97-466, supra, by reimbursing a claimant for any attorney fee actually incurred in those few cases where the only necessity for seeking court review was patently unwarranted action on the part of the VA in its consideration of the claim. Additionally, liability for a fee, even if limited in this manner, would continue to serve as a deterrent to the VA and encourage the Agency to avoid unwarranted action in the future. Likewise, since the statutory scheme provides for the payment of reasonable attorneys' fees by the claimant (except in punitive award cases), limiting the Government's liability to the same extent in no way results in a loss to the claimant's attorney. An attorney will receive exactly the same fee upon which the attorney and claimant agreed prior to bringing the action.

Finally, such a limitation would serve to complement our earlier suggestion that in those cases where a contingent fee agreement is not involved, the court's discretion in determining a reasonable fee for an attorney should be limited to either a definite percentage of past-due benefits or a specified dollar amount. Taken together, these two suggestions would provide a relatively simple method by which a court could determine a reasonable attorney's fee, to be paid by the claimant or the Government as found to be appropriate, with a minumum of judicial time and effort.

Section 402: Would make a gender change and strengthen the provisions of section 3405 of title 38 relating to attorney inpropriety. Under its provision a court would be authorized to punish an attorney or other person for willfully and intentionally defrauding a VA claimant.

We have no objection to this provision.

APPENDIX

Section	Title
I	VETERANS ADMINISTRATION ADJUDICATION AND APPELLATE PROCEDURES
II	OVERVIEW OF THE BOARD OF VETERANS APPEALS
III	LIMITATIONS TO 38 U.S.C. § 211(a)
IV	PRECLUSION OF REVIEW - JUDICIAL INTERPRETATION
V	SOCIAL SECURITY ANALOGY
VI	STANDARD OF REVIEW
VII	REVIEW OF FACTUAL AND LEGAL ISSUES
VIII	COST METHODOLOGY

Section I

VETERANS ADMINISTRATION ADJUDICATION AND APPELLATE PROCEDURES

Current Veterans Administration claims procedures are designed to afford full due process to claimants and to minimize the possibility of arbitrary and capricious decisions or abuse of discretion by the Administrator. These procedures are defined by statutes and regulations which charge the Veterans Administration with the duty to assist the claimant in developing the facts pertinent to his or her claim and the responsibility to render a decision which grants the claimant every benefit that can be supported in law, 38 C.F.R. § 3.103. Further, if the evidence presented raises a reasonable doubt regarding service origin, degree of disability, or any other point, regulations require that doubt to be resolved in favor of the claimant, 38 C.F.R. § 3.102.

The most salient characteristic of the Veterans Administration claim process is its informality. In most cases, a claimant may submit his own application without need of any assistance, and without an attorney. If a claimant desires assistance, or needs advice, he has access to Veterans Administration employees who specialize in answering inquiries and assisting in the development and submission of claims. At the same level, there exists a wide network of veterans' service organizations which furnish competent claim specialists at no charge to assist a claimant in the presentation of his claim.

Veterans Administration adjudication procedures are intended to be nonadversary in nature. In almost all cases, a claimant need do nothing more than file his claim. Although adjudication of the claim will actually take place at one of our 58 regional offices, the claimant may personally file or mail a claim to any Veterans Administration facility. The Veterans Administration maintain a number of Veterans services offices in various states to assist claimants. In addition, veterans benefits counselors are assigned to hospitals, domiciliaries, nursing homes and out-patient treatment centers to assist claimants and answer questions. All claims received are forwarded to the appropriate regional office for adjudication.

Adjudication of the claim can generally proceed without the necessity of the claimant appearing at a hearing, producing further evidence, or presenting witnesses. The Agency will procure records of military service and medical treatment basic to most claims. Where these records prove insufficient to establish the benefit being sought, the claimant is clearly told, whenever possible, what evidence would be required and

what sources are acceptable. As noted, it has always been the policy of the Agency to grant a claimant the benefit of the doubt, and in cases where service medical records do not substantiate the claim, lay evidence of the existence of a condition can be accepted. All evidence which has been submitted by a claimant, or is obtained by the Agency, is considered in arriving at a determination on the claim.

Once a decision has been reached, the Veterans Administration must provide the claimant with notice of the decision, as well as notice of hearing and appellate rights. (A sample of the form providing this notice is attached as Exhibit 1.) A claimant is entitled to a hearing on any issue at any stage in the proceedings. At a hearing, claimants may produce witnesses to testify on their behalf and may adduce evidence of any nature whatsoever in support of their claim. The hearing, wherever possible, is conducted by personnel who did not participate in the initial decision. The right to present and question witnesses is provided by the hearing procedures. However, the personal appearance of witnesses is not required. The informal nature of the process almost always results in all of the testimony desired by the claimant becoming a part of the record through letters and statements written on the claimant's behalf, without regard to formal rules of evidence. The VA may even send an employee to a potential witness' home or business to receive testimony for the record.

Any decision with which a claimant disagrees may be appealed within the Agency. An appeal is initiated by filing a Notice of Disagreement with the action in question within one year from the date of notification thereof. This can be a simple declaration of disagreement with such action. On receipt of a Notice of Disagreement, the regional office reevaluates the veteran's claim. If the denial is continued, the claimant is provided, usually within 90 days of receipt of the Notice of Disagreement, a Statement of the Case. The provisions of 38 U.S.C. § 4005 require that the Statement of the Case contain a summary of the evidence, citation and discussion of the pertinent laws and regulations, and the decision on the issue as well as the reasons therefor. The Statement of the Case is designed to assist the claimant to understand the law and the evidence relied upon, as well as the evidence lacking to establish entitlement. With the Statement of the Case, the claimant is provided with a form which provides him with instructions for completing his Substantive Appeal. (A sample of this

form is attached as Exhibit 2.) The claimant is also notified of his right to appear at a personal hearing before the Board of Veterans Appeals in Washington, D.C. The personal hearing may also be held before a traveling section of the Board of Veterans Appeals which makes periodic appearances at regional offices. In lieu of either of these alternatives, a claimant may also request a hearing on appeal before members of the regional office, the transcript of which is forwarded to the Board of Veterans Appeals in Washington.

Following any hearing and the timely receipt of a Substantive Appeal, the case is certified to the Board of Veterans Appeals. After a complete and independent review of the claim on the basis of all of the evidence of record, the Board renders its decision. The Board's action may be to allow the claim, deny it, or remand the case to the regional office having jurisdiction for further development. In the absence of obvious error of a material and reversible nature, the Board's decision is final. Section 4004 of title 38 requires that all Board decisions contain separately stated findings of fact and conclusions of law. As a matter of formal policy, all Board decisions contain a summary of the contentions and evidence, a concise statement of applicable laws and regulations and a discussion and evaluation intended to respond to all arguments raised and afford a complete explanation of the decision on each issue.

NOTICE OF PROCEDURAL AND APPELLATE RIGHTS

We have based our decision on the evidence of record in your case and the applicable law. This explains your procedural and appellate rights in connection with this decision.

REPRESENTATION. You may be represented, without charge, by an accredited representative of a veterans organization or other service organization recognized by the Administrator of Veterans Affairs, or you may employ an attorney to assist you with your claim. Typical examples of counsel who may be available include attorneys in private practice or legal aid services. The services of a recognized attorney are subject to a maximum fee limitation of $10, set forth in 38 U.S.C. 3404(c). If you desire representation, let us know and we will send you the necessary forms. If you have already designated a representative, no further action on your part is required.

NEW EVIDENCE. You may submit additional evidence to strengthen your claim. It is in your interest to send us any new evidence as promptly as possible. We will carefully consider it and let you know whether it changes our decision.

PERSONAL HEARING. If you desire a personal hearing to present evidence or argument on any point of importance in your claim, notify this office and we will arrange a time and place for the hearing. You may bring witnesses if you desire and their testimony will be entered in the record. The VA will furnish the hearing room, provide hearing officials, and prepare the transcript of the proceedings. The VA cannot pay any other expenses of the hearing, since a personal hearing is not required.

APPEAL. You may appeal our decision to the Board of Veterans Appeals at any time within one year from the date of this letter if you believe the decision is not in accord with the law and the facts now of record. You can start the appeal process by filing a Notice of Disagreement. You may do this by writing a letter to this office stating that you wish to appeal. If more than one benefit is involved, you should identify the benefit or benefits for which you are appealing. If you decide to appeal, we will advise you further as to your procedural rights as your claim progresses through the several stages of the appeal process.

VA FORM NOV 1975 1-4107

EXISTING STOCKS OF VA FORM 1-4107, MAR 1975, WILL BE USED.

Form Approved
OMB No. 2900-0085

IMPORTANT: Read instructions on reverse side before filling in form. Complete all items fully. Send this appeal to the VA office which made the decision being appealed.

VETERANS ADMINISTRATION

APPEAL TO BOARD OF VETERANS APPEALS

1. LAST NAME - FIRST NAME - MIDDLE NAME OF VETERAN (Type or print)	2. INSURANCE FILE NO. OR LOAN NO. (If pertinent)	3. CLAIM FILE NO. (Include prefix)

4. IF NOT MADE BY A PERSON OTHER THAN VETERAN INDICATE RELATIONSHIP

☐ WIDOW ☐ CHILD ☐ MOTHER ☐ FATHER ☐ OTHER (Specify)

5. NAME OF CLAIMANT (If other than veteran)	6. ADDRESS OF CLAIMANT (Number & street, City, State & ZIP Code)

7. DATE OF DECISION BEING APPEALED	8. VA OFFICE WHICH MADE DECISION BEING APPEALED (City & State)

REPRESENTATION ➧ See Par. 6 of instructions on reverse side

HEARING ➧ See Par. 7 of instructions on reverse side

9A. DO YOU WISH TO BE PRESENT AT A HEARING?	9B. IF YES, SPECIFY PLACE
☐ YES ☐ NO	☐ FIELD OFFICE ☐ WASHINGTON, D.C.

NOTE: A personal hearing is not necessary nor is a decision made at the time of the hearing.

10. I TAKE ISSUE WITH THE DECISION CITED ABOVE AND HEREBY PETITION THE BOARD OF VETERANS APPEALS FOR RELIEF AS SET FORTH BELOW. *(State in specific detail the benefits sought on appeal and your reasons for believing that the action appealed from is erroneous. Follow carefully the instructions in paragraph 3 on the reverse side.)*

(Attach additional sheets if necessary)

11. DATE	12. SIGNATURE OF CLAIMANT (Or representative)

VA FORM AUG 1981 1-9

SUPERSEDES VA FORM 1-9, JUN 1979, WHICH WILL NOT BE USED.

SECTION II

OVERVIEW OF THE BOARD OF VETERANS APPEALS

ESTABLISHMENT

The Board of Veterans Appeals is the appellate body charged with the responsibility to make final decisions on claims appealed from the various field offices of the VA. Its independence in that role is a mainstay in assuring the fairness of VA claims decisions. During the period from 1920 to 1933, an awkward, cumbersome and time-consuming appellate system for veteran claims developed. Almost every type of administrative board was tried in an unsuccessful attempt to develop a permanent and workable system. A number of appellate bodies developed whose jurisdictional boundaries were obscure. Other problems with the system included a lack of centralization, uniformity, and finality. By 1933, there were pension review boards, area boards, a Central Office Board, a Council on Appeals, the Solicitor's Office, and finally, the Administrator, all responsible for deciding appeals.

The Board of Veterans Appeals was created by Executive Order 6230, July 28, 1933. From the very beginning, the Board was designated a quasi-independent tribunal and was intended to provide one review on appeal to the Administrator of Veterans Affairs. The individuals responsible for the design of the Board were looking to establish an independent review board which could serve as a model for all agencies of the Federal government. The independence of the Board was strengthened by providing for life-time Board member appointments which required the approval of the President. The Board itself was associated with the Agency for budget and personnel purposes while the Chairman of the Board was answerable only to the Administrator. To this day the Board has remained wholly independent from the VA in its decision making and no Administrator has interfered in this process. The independence of the Board members was recently reaffirmed when the President excluded them from Merit Pay under 5 U.S.C. 5401(b)(2). The basis for this exception was that inclusion of this group in Merit Pay could adversely interfere with their quasi-judicial independence.

ORGANIZATION

The operations of the Board of Veterans Appeals are directed by a Chairman and Vice Chairman, both of whom are appointed by the Administrator with the approval of the President. By

statute, the number of Board members is limited to 50. These members are currently assigned to 17 appellate sections. Each section is usually comprised of three Board members, one of whom is designated Chief Member. Each section has from six to seven staff attorneys who initially review the appeals and draft proposed decisions. The decision is not considered to be final until all three Board members have reviewed the entire record, signed the decision, and the decision has been dispatched. The deliberations of the Board members are entirely independent and their decisions must be unanimous. The Chairman or Vice Chairman must participate in the decisionmaking process in those situations wherein there is a dissenting opinion and has the authority to concur with the majority of members to finalize the decision (38 U.S.C. § 4003(b)). If agreement cannot be reached, the Chairman or Vice Chairman has regulatory authority to expand the voting panel (38 C.F.R. § 19.145).

APPELLATE PROCEDURES

A general description of the Board's appellate procedures is included in Section I of this Appendix and will not be repeated here. There are, however, certain aspects of the Board's procedures that merit further discussion.

Advisory Opinions

During the course of their deliberations, Board members may seek an advisory medical opinion. In cases involving a medical controversy, the record may be referred to the office of the VA Chief Medical Director, the Armed Forces Institute of Pathology, or an independent medical specialist. These opinions are used for advisory purposes only. Although they are usually included in the text of appellate decisions, Board members are free to accept or reject them. These opinions are extremely valuable in areas of serious medical complexity and are accorded great weight by the Board. Although Board members may obtain these opinions on their own initiative, an appellant or representative may also request that one of these opinions be obtained prior to disposition of the appeal.

Finality, Reopening and Reconsideration

All questions on claims involving benefits under the laws administered by the VA are subject to one review on appeal to the Administrator. Final decisions on such appeals are made by the Board. Except for insurance appeals, there is no recourse to the Federal courts if an appellant is dissatisfied

with the Board's decision. (38 U.S.C. §§ 211(a), 784, 4004(a)). A claim can be reopened after a final determination has become final or after a Board of Veterans Appeals decision by submitting evidence which would support a new factual basis for a decision (38 U.S.C. § 4004(b)). This, in effect, constitutes a new claim.

Although appellate decisions are final, they can be reviewed at any time to determine if there is an obvious error of fact or law. This "reconsideration" may be initiated on the Board's own motion or that of an appellant. (38 U.S.C. § 4003). Reconsideration may be requested by filing a written brief in support of this motion, specifying those elements of the decision which are either factually or legally erroneous. The brief will be reviewed by the Chairman of the Board. If it is believed that an adequate argument has been made in support of a finding of error, the records will be docketed for reconsideration and a panel assigned to review the merits. Normally the panel will consist of those individuals who were the original signatories to the decision plus three additional Board members. If it is determined that there is no reasonable argument supporting a finding of error, the appellant will be notified that the request for reconsideration has been denied. Reconsideration is limited to a review of the prior decision and the evidence of record which was before the Board at the time of that decision. (38 C.F.R. §§ 19.148 through 19.152).

Precedence and Appellate Decisions

Board of Veterans Appeals decisions are not binding precedents; however, the Board strives to maintain uniformity and consistency in the deliberations of its 17 Board sections. The majority of decisions involve dissimilar medical histories and health patterns of individual veterans and, therefore, must be decided on their own merits.

In addition to statute and Agency regulations which are binding upon the Board of Veterans Appeals in its deliberations, 38 U.S.C. § 4004(c) specifies that instructions of the Administrator and precedent opinions of the General Counsel are binding upon the Board. (See also 38 C.F.R. § 19.103.)

There are many manuals, technical bulletins, circulars and other administrative issues which are published by the various departments of the Veterans Administration. Unless a particular publication is signed by the Administrator, it is not controlling in appellate decisions. Board members may review sections of these

publications for information purposes and background, or to assure a claimant received proper procedural protections, but they are not required to follow the dictates of these issues.

BVA WORKLOAD AND RESPONSE TIME

The Board decides approximately 34,000 appeals a year. Of that number, approximately 13 percent are allowed, 14 percent remanded, and 73 percent denied. The appeal process is begun by the claimant filing a notice of disagreement with the field office. For fiscal year 1981, 68,000 such notices were filed, 40,000 of which were prepared for transfer to and review by the Board.

Since its formation in 1933, the Board of Veterans Appeals has entered more than 1.5 million decisions. During the pre-statement of the case period (1933-1963) all appeals were sent to the Board for resolution. From about 40,000 in the early years, the number of appeals fell to less than 10,000 in 1944--at the height of World War II. The greatest number of appeals came in 1950--more than 80,000. Enactment of the statement of the case law in 1963 effectively cut the number of appeals that reached the BVA by one half. In 1970, the number of appeals fell to less than 21,000.

The Vietnam-era peak came in 1972-73 when nearly 30,000 appeals reached the Board. The number again began to grow in 1975 and since then there has been a sharp upswing. The number of new appeals to the BVA reached 42,000 in 1982 and the Board's pending workload stood at more than 27,000. This trend continues. We attribute the heavy appellate workload to three broad factors:

> First, veterans, like other members of our society, have become much more litigious than they were in the past. We note this in the fact that we are getting more appeals at a time when the number of claims being filed is declining.
>
> Second, aging veterans, pushed by economic conditions, seek whatever sources of income are available to them. Veteran benefits such as compensation or pension are areas in which many seek to increase their incomes.

Third, and a very significant factor, is the better training and more active roles taken by the national service organizations. These organizations are doing an excellent job in assisting veterans in developing their claims and pursuing their appeals.

The Board believes that total response time to an appeal should be about eleven months--seven in field station processing and four at the Board. Unfortunately, appeals are taking much longer than that at this time. Since the sharp upswing in the number of appeals, the Board's response time has shot from 2 1/2 months in 1976 to nine months in 1982. VA field stations have been able to cope with the workloads and have held their response times to an average of about seven months.

The Board has taken several actions to reduce the pending caseload and cut back on response time. It has formed a skeletal 17th section from the resources provided for 16 sections. It has also modified and shortened handling procedures and developed a positive case management system through automation of its control and locator functions. It has taken steps to improve and to automate its word processing capabilities. Despite the Board's best efforts, however, the appeals keep coming--faster than they can be handled.

Because of the increasing number of appeals being filed and the corresponding increase in the Board's average response time, we recently submitted proposed legislation to Congress that would permit the Board to expand to up to 65 members and 21 Board sections. In the absence of judicial review of BVA decisions, we anticipate that the requested increase in Board membership will be sufficient to meet the increasing appellate caseload and to eliminate and prevent the recurrence of the present backlog of pending cases.

In the event that Board decisions become subject to judicial review, however, the Board will be required to undertake a number of additional tasks and responsibilities such as longer, more complex decisions and court-ordered remands. If the Board's size is limited to 65 members as provided in S. 636, 98th Congress, we anticipate that the average BVA response time will increase to approximately 633 days by fiscal year 1988.

Section III

LIMITATIONS TO 38 U.S.C. § 211(a)

Judicial opinions in the Supreme Court and several circuit courts of appeals and district courts have recognized certain exceptions to the preclusion of review statute. The broad language of section 211(a) has been qualified in these opinions to permit the assumption of jurisdiction in the U.S. district courts where the constitutionality of statutes, regulations, and procedures governing veteran benefits is challenged, and where the VA's authority to promulgate regulations is in question.

The leading case in this area is Johnson v. Robison, 415 U.S. 361 (1974), in which the Supreme Court considered a challenge to the constitutionality of a statute denying veteran educational benefits to conscientious objectors who had not served in the military but instead performed alternate service. Although ultimately upholding the constitutionality of the challeged statute, the Court held that section 211(a) does not preclude judicial review of challenges to the constitutionality of veteran benefits legislation.

The conception pronounced in Robison was soon extended by the U.S. District Court for the District of Maryland to support jurisdiction over a constitutional challenge to VA pension termination procedures. Plato v. Roudebush, 397 F. Supp. 1295 (D. Md. 1975). The court held that the VA's failure to provide a pension recipient an opportunity for a pretermination hearing was a denial of the plaintiff's due process rights, and that section 211(a) does not preclude judicial review of the constitutionality of a VA procedural policy.

Several recent cases have followed Robison and Plato in permitting suits involving the constitutionality of VA legislation, regulations, or procedures. E.g., American Federation of Government Employees v. Nimmo, 536 F. Supp. 707 (E.D. Va. 1982) (challenge to VA's constitutional and statutory authority to enforce retroactively regulations requiring reimbursement of costs of non-service-connected medical care furnished to ineligible veterans); Dumas v. Cleland, 486 F. Supp. 149 (D. Vt. 1980) (claim that VA's procedures used in termination of veteran's wife status as spouse-payee of disability compensation violated due process). In Devine v. Cleland, 616 F.2d 1080 (9th Cir. 1980), the Ninth Circuit found that the absence of statutes or regulations providing for pretermination procedural protections in educational assistance allowance cases fell within the Robison exception, and permitted a due process challenge to the lack of such procedures.

Other decisions, however, have stated a more literal reading of Robison, in denying jurisdiction in suits couching challenges to Agency procedures or actions in constitutional terms. In Anderson v. Veterans Administration, 559 F.2d 935 (5th Cir. 1977), the Fifth Circuit applied section 211(a) to bar a veteran's allegations that constitutional deficiencies existed in VA hearing procedures used in adjudicating his claim for disability benefits. The court stated that, since the constitutional challenge was directed at the action of the Administrator of Veterans Affairs rather than any statutory provision, Robison did not apply. A district court decision, Mulvaney v. Stetson, 470 F. Supp. 725 (N.D. Ill. 1979), in a case challenging on constitutional grounds the denial of veteran medical benefits, stated that section 211(a) bars constitutional challenges to actions of the Administrator of Veterans Affairs under veteran benefit statutes. Similarly, in Pettus v. Veterans Administration Hospital Philadelphia, 517 F. Supp. 656 (E.D. Pa. 1981), the district court applied section 211(a) to bar a claim that medical and rehabilitative decisions of VA officials were discriminatory, stating that the challenge was not to any legislative act of Congress.

The other major line of cases providing exception from the preclusion of review statute concerns challenges to the validity of Agency regulations on other than constitutional grounds. The first case on this subject was Wayne State University v. Cleland, 590 F.2d 627 (6th Cir. 1978), in which the Sixth Circuit held that section 211(a) does not preclude challenges to the Agency's authority to promulgate regulations. In so holding, the court of appeals reasoned that permitting such suits would not involve the courts in the day-to-day operations of the VA or lead to judicial second-guessing of Agency determinations on particular claims. 590 F.2d at 631. The court also concluded that Congress did not intend to preclude judicial review of the limits of VA authority, and noted that previous decisions denying jurisdiction had involved individual claims rather than challenges to actions of broader application. 590 F.2d at 632.

Subsequent decisions in other circuits, involving as did Wayne State challenges to VA regulations governing educational assistance programs, followed the Sixth Circuit in finding that section 211(a) "was not designed to preclude judicial review of a challenge to the Administrator's authority to promulgate regulations . . ." Merged Area X v. Cleland, 604 F.2d 1075, 1078 (8th Cir. 1979); accord Evergreen State College v. Cleland, 621 F.2d 1002 (9th Cir. 1980); see University of Maryland v. Cleland, 621 F.2d 98 (4th Cir. 1980) (action of VA regarding disbursement of educational benefit checks challenged as

exceeding statutory authority). See also American Federation of Government Employees, 536 F. Supp. at 711 (recovery for medical care provided to ineligible persons). The University of Maryland decision was relied upon in Arnolds v. Veterans' Administration, 507 F. Supp. 128 (N.D. Ill. 1981), to support an expansive reading of the exception, i.e., that section 211(a) does not bar an action alleging that the Agency's unreasonable delay in processing his application for educational benefits exceeded statutory authority and violated his due process rights.

On remand in the University of Maryland case, the district court rejected the argument that section 211(a) precludes review of actions regarding individual benefit checks because a challenge to such actions amounted to an aggregation of individual claims. University of Maryland v. Cleland, 516 F. Supp. 448 (D. Md. 1981); cf., Gott v. Cleland, Civ. No. 80-0906 (D.D.C. Sept. 30, 1981), appeal docketed, No. 82-1159 (D.C. Cir. Feb. 17, 1982) (jurisdiction assumed in suit alleging nonbinding rules and practices exceeded statutory authority, despite fact that suit represented aggregation of a limited number of individual claims).

Finally, we note that the exception pertaining to unauthorized regulations and procedures has not yet been adopted by all judicial circuits. In Kirkhuff v. Nimmo, 683 F.2d 544 (D.C. Cir. 1982), the District of Columbia Circuit overturned a district court decision invalidating as ultra vires the Agency's regulation denying medical benefits for normal pregnancy and childbirth. The court found the regulation valid and thus left open what it characterized as the "difficult question" of whether section 211(a) precludes review of VA regulations alleged to have been promulgated in excess of statutory authority. 683 F.2d at 548.

De Magno v. United States, 636 F.2d 714 (D.C. Cir. 1980), suggested that section 211(a) may not bar review of Agency determinations where the VA affirmatively seeks recovery from a party based on its determination. See also DiSilvestro v. United States, 405 F.2d 150 (2d Cir. 1968), cert. denied, 396 U.S. 964 (1969). However, in the recent district court case of United States v. Ramsey, 539 F. Supp. 1062 (E.D. Tenn. 1982), the preclusion of review statute was used affirmatively as the basis for the Government's successful motion for judgment on the pleadings in an action to recover an overpayment of VA educational benefits.

Recent decisions have also shown a tendency by the courts to consider the substance of an action allegedly falling within an exception to section 211(a). In Carter v. Cleland, 643 F.2d 1 (D.C. Cir. 1980), the plaintiffs challenged a VA manual provision

on the basis that it violated due process and was promulgated without authority. The court of appeals affirmed dismissal of the plaintiff's claims, stating that the manual provision was merely an administrative guideline and not a regulation, and that review of an Agency decision under the non-binding guidelines would involve the court in adjudication of the merits of an individual claim. 643 F.2d at 9.

Similarly, in Brooks v. Cleland, 531 F. Supp. 103 (E.D. Mich. 1982), the plaintiff alleged that her due process rights were violated by a VA regulation providing that the Agency's failure to furnish a claim or notice of time limits does not extend the limits on the filing of benefit claims. The court found no jurisdiction, recognizing that the Agency's decision denying retroactive benefits was based not on the regulation, but on a factual finding concerning whether plaintiff's alleged inquiry regarding benefits could be considered a claim. 531 F. Supp. at 105-06.

In another recent case, Ryan v. Cleland, 531 F. Supp. 724 (E.D. N.Y. 1982), the plaintiff alleged that denial of VA health care for disabilities resulting from exposure to the toxic agent dioxin violated constitutional protections. The court dismissed the action, stating that despite the plaintiffs' "inventive" attempt to elevate their claims to a constitutional level, no bona fide constitutional issue was involved. 531 F. Supp. at 730.

Attempts to circumvent section 211(a) through insubstantial allegations of constitutional violations were also rejected in Barry v. United States, 527 F. Supp. 472 (D. S.C. 1981) (alleged denial of due process in adjudication occurring 32 years prior to suit), and Osorio v. Veterans Administration, 514 F. Supp. 94 (D.P.R. 1981), aff'd, 676 F.2d 681 (1st Cir. 1982) (allegation of racial discrimination unsupported). Also, section 211(a) has been applied to bar a claim for money damages which in substance represented an attempt to obtain review of an individual benefit decision. Taylor v. United States 642 F.2d 1118, 1120 (8th Cir. 1981).

The previously noted decisions articulating a narrow construction of the Robison exception may be attributable in large part to a judicial perception that the claims involved in those cases were insubstantial or were asserted only as a vehicle to obtain review of individual benefit determinations. In its per curiam decision in Anderson, the Fifthe Circuit apparently looked beyond

the constitutional "posture" of the plaintiff's claims when it applied section 211(a) to bar a challenge to an individual determination regarding entitlement to benefits. 559 F.2d at 936. In Pettus, the court relied on section 211(a) as the basis for rejection of one of several constitutional allegations, which were for the most part clearly without legal foundation.

In Mulvaney, the plaintiff's claims for damages and injunctive relief based on the VA's denial of medical benefits were largely incidental to his efforts to have his military discharge upgraded by the Air Force. Moreover, his primary objective with regard to the VA appeared to be merely the recovery of medical benefits, rather than vindication of his constitutional rights. The same court showed no reluctance in the later Arnolds case to limit the application of section 211(a) where more substantial claims concerning due process were alleged.

Thus, the decisions discussed above make it clear that section 211(a) by no means insulates every action of the VA affecting benefits from the scrutiny of the Federal courts. To the contrary, the Supreme Court has stated that judicial review of challenges to the constitutionality of statutes governing veteran benefits is available. Decisions in several circuits indicate that the courts may review constitutional challenges to Agency regulations and procedures, allegations that the Agency exceeded statutory authority in the promulgation of regulations, and other challenges involving matters of general applicability.

The case law, however, reaffirms that judicial readjudication of individual VA benefit decisions is precluded. Consequently, although exceptions to section 211(a) have been recognized in particular situations, the Agency will continue to raise the preclusion of review issue in actions which purport to raise constitutional questions, but which in substance represent deliberate attempts to obtain review of individual benefit determinations by circumvention of section 211(a). Also, where jurisdiction is found to exist in cases challenging regulations applied in individual benefit decisions, the Agency plans to argue that the court's review should be limited to the general legal issue. The Agency would argue that, should a regulation be found invalid, the matter should be remanded to the Agency for consideration of the merits of the individual claim.

SECTION IV

PRECLUSION OF REVIEW - JUDICIAL INTERPRETATION

The constitutional validity of section 211(a) cannot be seriously questioned. This issue was squarely addressed by the U.S. Court of Appeals for the District of Columbia Circuit in DeRodulfa v. United States, 461 F.2d 1240 (D.C. Cir.), cert. denied, 409 U.S. 949 (1972). The court stated,

> We conclude that the fact that adjudication of claims for noncontractual benefits is confided to the Administrator of Veterans' Affairs does not alone afford ground for constitutional complaint . . .

461 F.2d at 1257.

The decision was based on the dual theories that statutes providing for payment of veteran benefits create no vested rights in recipients, and that Congress is not obligated to provide a judicial remedy for the protection of rights it creates. Accord, Milliken v. Gleason, 332 F.2d 122 (1st Cir. 1964), cert. denied, 379 U.S. 1002 (1965).

Two years later, the Supreme Court implicitly upheld the constitutionality of the statute in holding that section 211(a) does not bar Federal courts from judging the constitutionality of veteran benefit legislation. Johnson v. Robison, 415 U.S. 361 (1974). The Court rejected the Government's contention that section 211(a) precludes judicial review of such legislation, indicating that such a construction would raise serious questions concerning the constitutionality of the statute. Since 1974, several lower Federal courts have expanded on the Robison holding as a basis for assumption of jurisdiction in suits alleging deprivation of due process under VA adjudicative procedures. This expansive reading of Robison, and consequent narrow construction of section 211(a), has largely eliminated any issue concerning transgression of constitutional limitations.

While government regulations have long been considered a restriction of private rights, and therefore subject to various procedural limitations, federal assistance, the acceptance of which has been considered voluntary, has traditionally carried with it fewer judicially recognized procedural rights. The theory that veteran benefit entitlement does not create a judicially protectible right derives from the longstanding doctrine that no one has a vested legal or property interest in a gratuitous benefit such as a pension. E.g., Frisbie v. United States, 157 U.S.

160, 166 (1895). This doctrine was applied in the area of veteran benefits in Lynch v. United States, 292 U.S. 571 (1934), where the Court stated,

> Pensions, compensation allowances and privileges are gratuities. They involve no agreement of parties; and the grant of them creates no vested right.

292 U.S. at 577.

Subsequent decisions have followed the rationale of Lynch in finding that the absence of vested rights in gratuitous veteran benefits justifies the denial of judicial jurisdiction over claims for such benefits. Milliken, 332 F.2d at 123; Van Horne v. Hines, 122 F.2d 207 (D.C. Cir. 1941), cert. denied, 314 U.S. 689 (1942).

A series of Supreme Court decisions involving a variety of Federal assistance programs other than veteran benefits has shifted the focus of the constitutional argument away from the distinction between gratuitous benefits and earned rights. These cases recognize that some level of protection is required in the termination of statutory entitlements, regardless of their classification. E.g., Bell v. Burson, 402 US. 535 (1971); Fleming v. Nestor, 363 U.S. 603 (1960). The leading case in this line is Goldberg v. Kelly. 397 U.S. 254 (1970), in which the Court held that the due process clause requires an evidentiary hearing before termination of welfare benefits under the Aid to Families with Dependent Children (AFDC) program. While the Court noted that "it may be more realistic today to regard welfare entitlement as more like 'property' than a 'gratuity'", it characterized the interest of a welfare recipient in continued payments as a statutory entitlement rather than a property interest. 397 U.S. at 261 n. 8.

The later Supreme Court decision Mathews v. Eldridge, 424 U.S. 319, 335 (1976), made clear that the requirements of due process vary with the interest protected, the risk of erroneous deprivation of the protected interest, and the administrative burden of additional procedural requirements. Accord Devine v. Cleland, 616 F.2d 1080, 1086 (9th Cir. 1980). In Mathews, the the Court distinguished the situation of disability compensation from subsistence programs such as AFDC on the basis that loss of disability benefits, which are not based on financial need, would likely not have the disruptive effect on the recipient's life which would result from the suspension of welfare benefits. 424 U.S. at 340-42. In finding that an evidentiary hearing is not required prior to termination of social security disability benefits, the Court also noted that in the disability situation the decision is more sharply focused, more easily documented, and based largely

on routine medical reports. Thus, the potential value of an evidentiary hearing is substantially less than in the welfare context. 424 U.S. at 343-45. VA disability compensation, which is not tied to the income level of the recipient, seems to be analogous to the social security benefits discussed in Mathews.

It is noteworthy that the cases dealing with the constitutional aspects of government benefits determinations have involved termination or reduction of existing benefits, where the claimant may have come to rely on the payments, rather than rejection of claims for new benefits. The situation regarding claims for new benefits remains unsettled, although it seems certain that less procedural protection is required. See Richardson v. Perales, 402 U.S. 389 (1971).

The application of these principles to the provision of veteran benefits has not yet been conclusively determined. One reported U.S. District Court decision, Plato v. Roudebush, 397 F. Supp. 1295 (D. Md. 1975), found a protected property interest in the continued receipt of veteran pension benefits. In Devine, 616 F.2d at 1088, the Ninth Circuit stated that, while an adversary proceeding is not necessary, due process requires advance written notice explaining the basis for termination of a veteran's educational allowance, and an opportunity to contest the decision by written and oral presentation of evidence. See also Wallace v. Administrator of Veterans Affairs, Civ. No. 14499 (D. Conn. filed Dec. 23, 1974) (Goldberg applied in action challenging reduction of disability benefits). Dicta in Devine, 616 F.2d at 1086, and Moore v. Johnson, 582 F.2d 1228, 1233 (9th Cir. 1978), indicate that the Ninth Circuit may be prepared to recognize a protected property right in statutory entitlement to veteran benefits. See generally Langston v. Johnson, 478 F.2d 915 (D.C. Cir. 1973) (due process allegations concerning VA procedures unsupported).

Review of the authorities leads to the conclusion that, regardless of the terminology employed, some measure of constitutional protection is available in the case of benefits due under statutory entitlements, particularly in the case of suspension or reduction of benefits already granted. However, the scope of the protection afforded will vary greatly with the circumstances. Under no set of circumstances has due process been held to require judicial review of an administrative determination regarding benefits. The Goldberg, decision, which required certain procedural protections for Federal entitlement recipients under specific limited circumstances, does not imply a need for judicial review of VA adjudications, nor does it undermine the legal or policy bases underlying the VA's preclusion of review statute.

Regardless of possible future developments concerning the nature of Federal entitlements, there remains a second independent rationale for the limitation of judicial review of VA determinations, i.e., that "'the United States, when it creates rights in individuals against itself, is under no obligation to provide a remedy through the courts; it may' instead 'provide an administrative remedy and make it exclusive . . .'". DeRodulfa, 461 F.2d at 1258 (quoting from United States v. Babcock, 250 U.S. 328, 331 (1919), and Dismuke v. United States, 297 U.S. 167, 172 (1936)). This longstanding principle has been noted in several Supreme Court decisions in addition to Babcock and Dismuke, e.g., Brotherhood of Railway & Steamship Clerks v. Association for the Benefit of Non-Contract Employees, 380 U.S. 650, 659 (1965), Switchmen's Union v. National Mediation Board, 320 U.S. 297, 301 (1943), and Tutun v. United States, 270 U.S. 568, 576 (1926) (dicta), and was relied on in Milliken, 332 F.2d at 123, and Strong v. United States, 155 F. Supp. 468, 469 (D. Mass. 1957), appeal dismissed, 356 U.S. 226 (1958), in rejecting constitutional challenges to the validity of section 211(a). The court of appeals in DeRudolfa, 461 F.2d at 1258, stated that this basis for section 211(a) possesses "at least an equal measure of validity" as the gratuity theory, and that Congress acted well within its legislative prerogatives when, in enacting section 211(a), it made veterans' administrative remedies exclusive.

The argument is frequently raised that veterans have been unfairly singled out in having review of their claims against the Government confined to administrative proceedings. However, although 38 U.S.C. § 211(a) may be the most visible and widely discussed statute precluding judicial review of administrative action, such statutes are relatively common throughout the Federal Government and continue to apply in a variety of situations. The Administrative Conference of the United States has identified some forty examples of statutes precluding or restricting judicial review of administrative action. Linda A. Sedivac, "Congressional and Judicial Limitations on the Reviewability of Certain Administrative Decisions Taken Pursuant to Authority Delegated by Congress", October 1980.

Of course, many of these statutes address specific issues, and some provide an opportunity for review under limited circumstances. The fact remains, however, that judicial review is precluded or severely restricted in such important areas as: selective service classification and processing, 50 U.S.C.

App. § 460(b)(3); grant, denial, and revocation of parole, 18 U.S.C. § 4218(d); exclusion orders affecting arriving aliens, 8 U.S.C. § 1105a(b); and determinations controlling coverage of states and localities under the Voting Rights Act, 42 U.S.C. § 1973b(b). Particularly analogous is the provision of the Federal Employees Compensation Act precluding, in language very similar to that used in section 211(a), judicial review of the grant or denial of compensation to Federal employees suffering work-related injuries. 5 U.S.C. § 8128(b).

Judicial opinions applying statutes of this nature have uniformly upheld their validity, in some cases with limitations generally comparable to those applicable to section 211(a). E.g., Waters v. United States, 458 F.2d 20, 22 (8th Cir. 1972) (Federal Employees Compensation Act award not subject to judicial review); Ungar v. Smith, 667 F.2d 188, 196 (D.C. Cir. 1981) (non-reviewability provision of International Claims Settlement Act does not bar constitutional claims regarding agency procedures); Bailey v. Romney, 359 F. Supp. 596, 599 (D.D.C. 1973) (National Housing Act provision bars review of decisions under agency regulations, but not review of the validity of the regulations themselves). Thus, not only have veterans not been singled out for disparate treatment, but the informal and supportive nature of the VA's administrative process provides a greater degree of fairness than may be available to beneficiaries under many other Federal programs.

SECTION V

SOCIAL SECURITY ANALOGY

The Social Security Administration's experience with judicial review of Social Security determinations as provided under the Social Security Act demonstrates that judicial involvement in administrative determinations concerning benefits is not desirable. The number of suits challenging Social Security determinations has risen drastically over the years to approximately 25,000 pending cases at the end of 1982. The number of new cases filed annually has increased rapidly in recent years, from 7,814 in fiscal year 1980 to 12,045 in fiscal year 1982.

Based on fiscal year 1982 figures, Social Security cases were estimated by the Department of Justice to represent almost fifty percent of all civil actions commenced against the United States. The Department of Justice reported, in commenting on S. 349 in the 97th Congress, that it has experienced serious caseload problems since adoption of the judicial review provisions pertaining to Social Security benefit determinations, and that it would expect to encounter a similar caseload expansion as a result of enactment of a judicial review provision affecting the VA.

Social Security litigation has led to substantial criticism that, despite the applicability of a substantial evidence standard of review, district judges frequently conduct de novo factual review and substitute their judgment for that of the administrative agency. Social Security Administration (SSA) experience also indicates that, while only a small proportion of litigated cases raise substantive legal issues, in roughly half of all cases appealed to the district courts the agency's decision is reversed or the case is remanded for further consideration.

This high percentage of reversals and remands suggests that in many cases the courts may not only be departing from the statutorily prescribed limitations on the scope of judicial review, but may also be substituting their views for those of the SSA as to the proper administration of the Social Security benefit program. An individual court's exposure to such cases is limited so that Federal judges lack the perspective of Social Security administrative officials who deal exclusively with such cases. Especially in the disability area, the most complex group of cases, the courts lack the technical expertise and background to deal with the complex criteria applicable. Finally, a decision by an Administrative Law Judge--a specialist in disability cases, who has had the benefit of personally observing the claimant and witnesses--confirms the judgment of two earlier decisionmakers and is itself considered by at least one member of the Social Security Appeals Council. Under these circumstances, we must question whether the high rate of reversals and remands is indicative of improper decisions by the SSA.

Dissatisfaction with the judicial review process caused the Department of Health, Education and Welfare to propose legislation in the 96th Congress to limit judicial review of Social Security disability claims to questions of constitutional violations and statutory construction. This proposal was based on the conclusion that the burden on the courts and the administrative process resulting from judicial review was unwarranted. In that Congress, the Senate amended a House passed measure dealing with disability insurance, adding a provision further limiting the scope of judicial review of SSA factual determinations. Although this provision was later deleted in conference, in order to alleviate some of the problems caused by judicial review and case remands, the final version of the bill did limit the granting of remands for the purpose of taking additional evidence to situations where good cause is shown for failure to submit material evidence at the administrative level. Pub. L. No. 96-265, § 307, 94 Stat. 458 (1980).

A comprehensive review of the SSA adjudicatory process by the Center for Administrative Justice in 1977, in a report entitled "Study of the Social Security Administration Hearing System", analyzed the contributions of judicial review to the SSA administrative process. The study concluded that any beneficial effect of judicial review on the accuracy of SSA adjudications is modest at best, while suggesting that such review may have some negative effects.

For example, the study noted that district judges, not being specialists in hearing Social Security cases, may lack the perspective of agency appeals officers in assessing the validity of claims. The study also found that the threat of judicial reversal is in many cases too remote to have a measurable beneficial impact on the diligence of agency adjudicatory officials.

The study also indicated that the creation of judicial precedents in individual benefit cases has had limited positive impact on the administrative process. Finally, the study questioned the actual legitimizing impact of judicial review on the adjudication process. This criticism was based on the fact that, although the number of court cases filed each year is large, the percentage of participants who take their cases to court is not great. Given this background, the VA is unwilling to endorse any proposal which would create a system analagous to that involving the review of Social Security claims.

SECTION VI

STANDARD OF REVIEW

The Veterans Administration's position is that the complex and technical factual questions which form the basis of Agency benefit determinations should not be subject to readjudication by the courts. S. 636, 98th Congress, attempts to limit judicial review of Agency factual determinations by providing that the district courts shall set aside a finding of material fact made in reaching a decision on a benefit claim, when the finding is "so utterly lacking in a rational basis in the evidence that a manifest and grievous injustice would result" if it were not overturned. We are concerned, however, that the grant of any authority to engage in review of Agency fact-finding on individual claims may encourage some courts to examine the facts de novo and substitute judicial judgment on factual matters for that of the Agency. In particular, uncertainty with regard to the appropriate standard of review to be applied may invite unwarranted judicial intrusion into the administrative process.

Although the concept is not uncommon in judicial opinions on administrative matters, the meaning of the term "rational basis" is far from settled. When this term is combined with the "utterly lacking" and "manifest and grievous injustice" language of the proposal, which, to our knowledge, is without statutory or judicial precedent, a new standard is created which may be subject to contradictory and unforeseen construction in the courts.

Another major drawback of a standard employing the term "rational basis" is the very real possibility that this concept and the nebulous standard of arbitrary and capricious agency action may be found to be equivalent. In Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 290 (1974), the Supreme Court indicated that a rational basis for agency action is all that is required to meet the arbitrary and capricious standard. Subsequent court of appeals decisions have stated that to satisfy the arbitrary and capricious standard a rational basis for an administrative decision must be found in the facts of record. Almay, Inc. v. Califano, 569 F.2d 674 (D.C. Cir. 1977); see Environmental Defense Fund, Inc. v. Costle, 657 F.2d 275 (D.C. Cir. 1981); National Small Shipments Traffic Conference, Inc. v. C.A.B., 618 F.2d 819 (D.C. Cir. 1980). Thus, adoption of a test based on rational basis may result in a standard substantially similar to the arbitrary and capricious test previously rejected by the Committee as inappropriate for review of VA factfinding. S. Rep. No. 97-466, 97th Cong., 2d Sess. 44-45 (1982).

Moreover, although the Committee, in considering the predecessor of this bill, intended that the arbitrary and capricious standard would apply as a test of Agency regulations and procedures, id. at 46, the wording of the proposed statute creates the possibility that the arbitrary and capricious test may be superimposed as an alternative standard for review of Agency benefit decisions. The bill provides that the courts shall set aside decisions of the Administrator of Veterans Affairs found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

While the language of the bill exempts from the arbitrary and capricious test findings of material fact made in reaching a benefit decision, it seems likely that courts may nonetheless apply the arbitrary and capricious standard to other aspects of VA benefit determinations, e.g., the legal sufficiency of evidence relating to a factual matter. As recognized by the Committee, id. at 45, courts may not look to legislative history for clarification of a statutory provision the meaning of which appears clear on its face. Thus, the arbitrary and capricious test could well be applied to the review of VA benefit determinations.

In the 97th Congress, the Committee expressed concern at the confused body of law surrounding application of the arbitrary and capricious standard of review. Id. at 44-45. The legal community remains undecided on such basic questions as whether the arbitrary and capricious standard and the substantial evidence test are equivalent, and if not, which test calls for the broader standard of review. Compare Abott Laboratories v. Gardner, 387 U.S. 136 (1967) (substantial evidence test affords considerably more generous review than arbitrary and capricious test) with Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (decision may be arbitrary and capricious if based on a clear error in judgment), Bowman Transportation, 419 U.S. at 284 (agency motion may be arbitrary and capricious although supported by substantial evidence), and, Pacific Legal Foundation v. D.O.T., 593 F.2d 1338, 1343 n. 35 (D.C. Cir.), cert. denied, 444 U.S. 830 (1971) (abuse of discretion if action not supported by substantial evidence). Although it has been suggested that the clear error language of the Overton Park decision may have been inadvertent, the decision has been followed in subsequent cases concerning administrative decision-making. See City of Hartford v. Towns of Glastonbury, 561 F.2d 1032, 1043 (2d Cir. 1976), cert. denied, 434 U.S. 1034 (1978).

The differences between standards of review of agency action may be largely semantic, Pacific Legal Foundation, 593 F.2d at 1343 n. 35, and the real test of the validity of an agency decision may be its reasonableness. K. Davis, Administrative Law Treatise § 29.00 (Supp. 1982). Despite fine differences in statutory language, the scope of judicial review of an action is likely to depend on factors such as the judge's perception of the conscientiousness and fairness of the administrative decisionmaker. If the court lacks confidence in an administrator, it may be prone to substitute its judgment for that of the agency. K. Davis, Administrative Law of the Seventies, § 29.00 at 649 (1976). As stated by Professor Kenneth C. Davis ". . . judicial judgment about how much to review any particular case overrides whatever slight effect the verbalisms may have." K. Davis, Administrative Law Treatise § 29 at 533 (Supp. 1982). This willingness of the courts to disregard statutory distinctions raises concern that any standard of review involving factual aspects of VA benefit decisions may open the door to unwarranted judicial intervention.

Professor Davis suggests doing away with the complex, conflicting and confusing verbiage surrounding standards of review. Id. at 520. Yet the bill would add to this confusion by creating a new standard of uncertain meaning. Although the view has been expressed that veterans cannot obtain complete review of their claims without some measure of judicial oversight of Agency factual determinations, we feel the problem of defining a standard which will preclude excessive judicial intervention in the administrative process makes judicial oversight of fact-finding unworkable.

Further, we believe that judicial review of administrative determinations involving factual issues is particularly inappropriate and unnecessary in the case of the VA, in view of the Agency's liberal policy of assisting claimants in establishing entitlement to all benefits for which they are eligible under law. Moreover, the efficacy of judicial review of administrative fact determinations is substantially reduced by the governing principle in VA proceedings that reasonable doubt is to be resolved in favor of the claimant.

Finally, we are concerned that the standard for factual review proposed in the bill may interfere with the crucial role of Agency fact-finders in assessing witness credibility at administrative hearings. The courts have rightfully accorded substantial deference to the determinations of administrative fact-finders concerning witness demeanor and credibility. N.L.R.B. v. Bausch & Lomb, Inc., 526 F.2d 817, 822 (2d Cir. 1975); Olin Construction Co., Inc. v. Occupational Safety and Health Review Commission, 525 F.2d 464, 467 (2d Cir. 1975). However, the potential for difficulty exists.

The claimant in a VA claims proceeding may in many cases be the only witness regarding key issues, see Brooks v. Cleland, 531 F. Supp. 103 (E.D. Mich. 1982), and crucial factual determinations may turn on the credibility of his or her testimony. A court applying a standard requiring a rational basis for Agency action may be reluctant to uphold an Agency fact-finder's determination, properly based on an assessment of the claimant's credibility, which is inconsistent with the uncontradicted testimony of the claimant. See Dickinson v. United States, 346 U.S. 389 (1953).

Although a detailed explanation of the administrative fact-finder's reasons for rejecting testimony may satisfy the court, White Glove Building Maintenance, Inc. v. Brennan, 518 F.2d 1271 (9th Cir. 1975), adequate articulation of such judgments would place an additional burden on busy adjudication personnel. Moreover, there may be reluctance on the part of the fact-finder to question in writing the veracity of a veteran. In this way, the vital role of the administrative fact-finder may be subverted.

In view of the above discussion, we believe that any attempt to provide judicial review of VA factual determinations regarding benefits claims would be subject to expansive interpretation by the courts and would endanger the proper functioning of the Agency's administrative process, a process that most interested parties agree has provided substantial justice and fair treatment to veterans. We therefore recommend that, if judicial review of VA benefit determinations is considered necessary, such review be confined to purely legal issues.

SECTION VII

REVIEW OF FACTUAL AND LEGAL ISSUES

The distinction between factual and legal issues has been of concern to the Federal courts as a result of the principle, embodied in Federal Rule of Civil Procedure 52(a), that appellate courts may disturb factual findings of trial courts only where those findings are clearly erroneous. This rule is based on the understanding that trial judges are in a better position to assess witness demeanor and credibility. Appellate courts are not bound by legal conclusions of lower courts.

The courts have nad little difficulty in identifying the interpretation of a statute as a legal issue, or matters concerning the actions of the parties as factual. However, considerable disagreement has arisen over mixed question cases involving the application of a legal principle to the facts of an individual case.

Some decisions have found that, where the facts of a case are not in dispute, the appellate court is in as good a position to weigh evidence as the trial court and the clearly erroneous standard has no application. E.g., United States v. Parke, Davis & Co., 363 U.S. 29, 44 (1960); In re J.A. Thompson & Son, Inc., 665 F.2d 941, 951 (9th Cir. 1982). The principle has also been stated that an appellate court is not bound by findings of fact based on an erroneous interpretation of law. E.g., id.; Williams v. New Orleans Steamship Association, 673 F.2d 742, 746 (5th Cir. 1982).

Many decisions have relied on the concept of "ultimate facts" in differentiating factual and legal issues in mixed question cases. As explained by the Fifth Circuit, findings of fact can be categorized as findings of subsidiary facts, that is, evidentiary or primary facts, or as findings of ultimate facts, determinative conclusions drawn from subsidiary facts. Examples of findings of ultimate fact include the determinations that discrimination or patent infringement has occurred, or that income must be classified in a particular manner for tax purposes. According to the Fifth Circuit, the clearly erroneous standard does not apply to determinations of ultimate fact. United States ex rel. General Electric Supply Co. v. Wiring, Inc., 646 F.2d 1037, 1041 (5th Cir. 1981).

Courts of appeals in several other circuits have reached conclusions similar to those stated in General Electric. E.g., Glasson v. City of Louisville, 518 F.2d 899, 903 (6th Cir.), cert. denied, 423 U.S. 930 (1975) (determinations which attach legal significance to historical facts may be reversed

if erroneous). Peterson Industries, Inc. v. Lake View Trust & Savings Bank, 584 F.2d 166, 168 (7th Cir. 1978) (scope of review is broad where application of legal rule to facts involves an ultimate judgment concerning the character of fundamental facts). However, other decisions in some of these same circuits have indicated that unrestricted review is not available for legal inferences termed ultimate findings. See Raglund Investment Co. v. Commissioner, 435 F.2d 118, 119-20 (6th Cir. 1970) (ultimate finding of Tax Court concerning classification of income is finding of fact); Grant v. Smith, 574 F.2d 252, 255 (5th Cir. 1978) (dicta - ultimate finding concerning discrimination ordinarily for the trier of fact).

Conflicts between circuits as to whether particular conclusions are findings of fact or law are common. Compare Manning v. Trustees of Tufts College, 613 F.2d 1200, 1203 (1st Cir. 1980) (determinations concerning discrimination subject to clearly erroneous standard) with Stewart v. General Motors Corp., 542 F.2d 445, 449 (7th Cir. 1976), cert. denied, 433 U.S. 919 (1977) (appellate court will make independent determination concerning ultimate fact of discrimination). Compare Squillacote v. Graphic Arts International Union Local 277, 513 F.2d 1017, 1021 (7th Cir. 1975) (determination whether NLRB had reasonable cause to believe violation had occurred is a finding of fact) with Danielson v. Joint Board of Coat, Suit & Allied Garment Workers' Union, 494 F.2d 1230, 1244 (2d Cir. 1974) (determination that NLRB had reasonable cause is one of law). Compare United States v. J.B. Williams Co., Inc., 498 F.2d 414, 431 (2d Cir. 1974) (determination whether an action falls within the scope of a consent order is a question of fact) with United States v. Reader's Digest Association, Inc., 662 F.2d 955, 963 (3d Cir. 1981), cert. denied, 455 U.S. 908 (1982) (issue of whether consent order has been violated is a question of law). One decision appears to have resolved the mixed question issue by applying both standards of review to the issue in question. See Ealy v. Littlejohn, 569 F.2d 219, 229 n. 31 (5th Cir. 1978). Review of these conflicting decisions highlights the potential for confusion and inconsistency in the application of the fact/law distinction to review of VA benefit determinations.

In our view, differing circumstances justify a narrower approach to review of Agency fact-finding than would be available in appellate review of trial court findings.

In the latter case, the opportunity of the trier of fact to assess demeanor and credibility is the primary rationale for limiting review. However, where VA determinations are concerned, the additional considerations of the unique, non-adversarial nature of VA proceedings and the desire to avoid involving the courts in the specifics of individual benefit determinations are present. For the foregoing reasons, we recommend that, if judicial review of VA benefit determinations is considered necessary, review be limited to interpretation of constitutional, statutory, and regulatory provisions and that mixed questions of law and fact be specifically excluded from the scope of review.

Section VIII

COST METHODOLOGY

GENERAL COUNSEL

JUDICIAL REVIEW METHODOLOGY

1. From Jim Derhaag - BVA - 3/9/83: Appeals processed in FY 1984 and beyond will average 35,200 per year. The BVA denial rate will be 60%.

2. According to the Social Security Administration's Bureau of Hearings and Appeals about 20% of those denied cases will be appealed to judicial review.

3. The organization structure of the Office of General Counsel will be similar to that required for handling of tort actions. Primary responsibility will rest with District Counsel Offices and oversight provided by Central Office. Central Office will also handle Constitutional cases.

4. Preparation and court time will require approximately 24 attorney hours per case and support (clerical) time will consume about 18 hours per case.

5. A productive workyear is assumed to be 1,600 hours net of leave and administrative requirements.

6. First-year (non-recurring) costs for each new employee will be $1,000. This is for desks, chairs, telephones and office equipment.

7. Recurring costs of office supplies, replacement equipment, etc. will be $700 per FTEE. Travel for this program will be approximately $20,000 per year for training and litigation.

8. Salaries are computed at step 4, benefits assumed at 10% of salary (historical ratio).

3/11/83 ARW

GENERAL COUNSEL

S. 636, 98th Congress

JUDICIAL REVIEW

BVA appeals	35,200 per year	EMPLOYMENT
60% denials	21,100 " "	GM-15 - 1 C.O.
20% to Judicial Review .	4,200 " "	GM-14 - 3 C.O. GS-11 - 63 field GS- 5 - 47 field
42 manhours/case	176,400 manhours	
FTEE required ..... (based on 1600 hours/FTEE)	110 FTEE	

COST ESTIMATE

FY 1984

GM-15 @ $53,407; GM-14 3@ $45,405;
GS-11 63@ $26,959; GS-5 47@ $14,707

Total salaries	= $ 2,579,300
Benefits @ 10%	= 257,900
Non-recurring	= 105,000
Recurring	= 73,500
Travel	= 20,000
TOTAL FY 1984	= $ 3,035,700

FY 1985 to FY 1988

Salaries & Benefits	= $ 2,865,600
Recurring costs	= 73,500
Travel	= 20,000
TOTAL COST per year	= $ 2,959,100

3/11/83

BOARD OF VETERANS APPEALS

March 9, 1983

JUDICIAL REVIEW

Additional Costs

1. Purpose. This paper contains cost estimates of judicial review under S. 636 for the Board of Veterans Appeals.

2. Considerations.

o The BVA will add five Board Sections, complete with supporting personnel, for a total of 138 employees.

o The special 2-year travel board test will be conducted with existing BVA personnel.

o Costs are based on estimates as of mid-FY 1983. Payroll costs are incremented at one-percent annually. Other costs are increased using inflation rates prescribed for VA planning and budget estimates for FY 1984-1988.

3. Cost Estimates. (000's)

Object	FY 1984	FY 1985	FY 1986	FY 1987	FY 1988
Payroll	$4,480.0	$4,525.0	$4,570.0	$4,616.0	$4,662.0
Operating costs:					
Recurring 1/	782.0	793.0	804.0	816.0	829.0
One-time	219.0	-	-	-	-
Sub-total	$5,481.0	$5,318.0	$5,374.0	$5,432.0	$5,491.0
Travel Board Test (travel only)	72.0	75.0	-	-	-
Total costs	$5,553.0	$5,393.0	$5,374.0	$5,432.0	$5,491.0

1/ Includes 2,800 IME opinions @ $200.

Total estimate of 5-year BVA costs is $27,243,000.

NOTE: Estimates do not include costs of office space leased, telecommunications, utilities, and similar housekeeping costs. These objects are not in the BVA budget.

BOARD OF VETERANS APPEALS

March 9, 1983

JUDICIAL REVIEW

Workload and Response Time Projections

1. Purpose. This paper contains workload estimates, inputs, outputs, and associated response times for several organizations of the Board.

2. Assumptions.

o To meet the requirements of judicial review, BVA output will be 1,675 decisions per section per year.

o There will be 41,000 new appeals added to the BVA workload each year. (This is the figure used in the FY 1984 budget.)

3. Organizations.

o The BVA with 16 board sections:

	Estimates				
	FY 1984	FY 1985	FY 1986	FY 1987	FY 1988
Appeals pending, start of period	43,050	57,250	71,450	85,650	99,850
Appeals received	41,000	41,000	41,000	41,000	41,000
Total workload	84,050	98,250	112,450	126,650	140,850
BVA decisions	26,800	26,800	26,800	26,800	26,800
Appeals pending, end of period	57,250	71,450	85,650	99,850	114,050
Cases chargeable to the BVA	46,250	60,450	74,650	88,850	103,050
Average BVA response time (days)	630	823	1,017	1,210	1,403

	FY 1984	FY 1985	FY1986	FY 1987	FY 1988
o The BVA with 18 board sections:					
Appeals pending, start of period	43,050	53,900	64,750	75,600	86,450
Appeals received	41,000	41,000	41,000	41,000	41,000
Total workload	84,050	94,900	105,750	116,600	127,450
BVA decisions	30,150	30,150	30,150	30,150	30,150
Appeals pending, end of period	53,900	64,750	75,600	86,450	97,300
Cases chargeable to the BVA	42,900	53,750	64,600	75,450	86,300
Average BVA response time (days)	519	651	782	913	1,045
o The BVA with 21 board sections:					
Appeals pending, start of period	43,050	48,850	54,650	60,450	66,250
Appeals received	41,000	41,000	41,000	41,000	41,000
Total workload	84,050	89,850	95,650	101,450	107,250
BVA decisions	35,200	35,200	35,200	35,200	35,200
Appeals pending, end of period	48,850	54,650	60,450	66,250	72,050
Cases chargeable to the BVA	37,850	43,650	49,450	55,250	61,050
Average BVA response time (days)	392	453	513	573	633

BOARD OF VETERANS APPEALS

March 9, 1983

JUDICIAL REVIEW

Impact Assessment

1. Purpose. The purpose of this paper is to make impact assessments -- in terms of people, organization, and costs -- of judicial review under S. 636, introduced on March 1, 1983.

2. Considerations. Considerations which form bases of this BVA impact assessment include:

o The Bill changes the statutory limitation on the number of board members from 50 to "not more than 65." § 103.

o The BVA would be organized with two deputy vice chairmen, 21 board sections (63 members), and appropriate professional and administrative support.

o BVA decisions would have to serve two purposes. First, they would have to continue to be responsive to appellants while, second, they would have to meet requirements of the courts.

o Since veterans' records normally would not be sent to courts, the Board's decisions would have to be enlarged to include a recitation, in detail, of all evidence in order to permit the court to determine relevancy and commensurate weight.

o Many BVA decisions would require opinions of independent medical experts (IME). The proposed legislation states "(c) Whenever there exists in the evidence of record in an appeal case a substantial disagreement between the substantiated findings or opinions of two physicians with respect to an issue material to the outcome of the case, the Board shall, upon the request of the claimant and, after taking appropriate action to attempt to resolve the disagreement, arrange for an advisory medical opinion in accordance with the procedure prescribed in subsection (b) of this section." § 108.

o The courts will remand cases to the Board for further action and development. This will effectively increase the number of cases on the Board's docket.

o The legislation contains provisions charging the Board to consider and dispose of appeals properly before it "in a timely manner." § 103(1)(c).

3. Background. Judicial review under S. 636, introduced March 1, 1983, would add a number of tasks and responsibilities to the Board of Veterans Appeals. In addition, it would require the Board to reorganize, to make some procedural changes, and to change its decision content.

o Appellate workloads have risen sharply over the past several years. Following is a summation of BVA workloads and response times to appeals at the end of FY 1982 and projections for FY 1983 through FY 1987. THESE PROJECTIONS ARE BASED ON ACTUAL DATA THROUGH FIRST QUARTER, FY 1983. FOR FY 1984 AND BEYOND, THE BVA IS ORGANIZED WITH 19 SECTIONS AND 408 FTEE (FY 1984 BUDGET AUTHORIZATIONS). THESE FIGURES ARE WITHOUT REGARD TO THE PASSAGE OF JUDICIAL REVIEW LEGISLATION.

	Actual	Estimates				
	1982	1983	1984	1985	1986	1987
Appeals pending, start of period	31,810	38,050	43,050	42,250	41,450	40,650
Appeals received	+42,011	+41,000	+41,000	+41,000	+41,000	+41,000
Total workload	73,821	79,050	84,050	83,250	82,450	81,650
BVA decisions	-35,771	-36,000	-41,800	-41,800	-41,800	-41,800
Appeals pending, end of period	38,050	43,050	42,250	41,450	40,650	39,850
Cases chargeable to the BVA	27,050	32,050	31,250	30,450	29,650	28,850
Average BVA response time (days)	276	325	273	266	259	252

o The following table shows workload estimates and corresponding response times with the BVA organized with 21 sections--without regard to judicial review legislation:

Appeals pending, start of period	31,810	38,050	43,050	37,850	32,650	27,450
Appeals received	+42,011	+41,000	+41,000	+41,000	+41,000	+41,000
Total workload	73,821	79,050	84,050	78,850	73,650	68,450
BVA decisions	-35,771	-36,000	-46,200	-46,200	-46,200	-46,200
Appeals pending, end of period	38,050	43,050	37,850	32,650	27,450	22,250
Cases chargeable to the BVA	27,050	32,050	26,850	21,650	16,450	11,250
Average BVA response time (days)	276	325	212	171	130	89

4. Assumptions. To develop estimates to satisfy the requirements of S. 636, certain assumptions are necessary. These include:

o Due to increased complexity, more recitation of evidence, findings of fact, and conclusions of law, BVA decisions will increase in length by approximately 50 percent.

- BVA section production will drop by one-fourth--from an average output of 2,225 decisions per section in 1982 to 1,675 per year under judicial review. This permits maximum annual output of approximately 35,200 decisions.

- Average attorney production will fall by one-third--from 334 decisions (actual 1982) to 223 decisions per year under judicial review. This translates into 158 attorneys to prepare 35,200 decisions per year.

- Line counts will increase from an average of 161 lines (actual 1982) to 242 lines per decision. This will require the addition of 10 transcriptionists to produce 35,200 decisions..

o The Board's output of 35,200 decisions will be comprised of:

- New appeals	30,400
- Returned from remand to the field	3,600
- Remands from the courts	1,200

o Estimating remands from the courts:

- The Board's denial rate will be reduced from the present level of about 70 percent to 60 percent under judicial review. This will be due to use of precedent court decisions as bases for new appeals. (20,400)

- About 20 percent of cases denied by the BVA will be appealed to the courts. This is based on experience of Social Security Administration. (4,080)

- Of cases reaching the courts on appeal, about 30 percent will be remanded to the BVA for further action and development. This also is based on SSA experience. (1,200)

o The BVA remand rate will continue at about 15.8 percent. (4,800)

- Field stations will grant benefits in about 25 percent of cases remanded to them. (1,200)

- Field stations will return about 75 percent of the remands to the BVA for final decisions. (3,600)

o We estimate that 2,800 BVA decisions will require IME opinions. We reach that figure through the following methodology:-

- Of 34,000 decisions per year (30,400 new appeals plus 3,600 remands returned from the field), 60 percent will be denied. (20,400)

- About 50 percent of the denials will be appeals for service connection. (10,200) Of these, 20 percent will require IME opinions. (2,040)

- About 25 percent of the denials will be appeals for increased ratings of service connected disabilities. (5,100) Of these, about 10 percent will need IME opinions. (510)

- About 12 percent of the denials will be appeals involving pension or service connection for cause of death. (2,450) About 10 percent of these cases will need IME opinions. (245)

NOTE: The Board of Veterans Appeals now experiences some difficulty in obtaining cooperation with medical schools in furnishing IME opinions at the rate of 200-300 per year.

o The BVA will not process payments of attorney fees.

o The BVA travel board program--except for the mandated special 24-month study--will be unchanged.

Veterans Administration

Memorandum

Date MAR 15 1983

From Chief Benefits Director (20)

To Deputy Assistant General Counsel (022A)

Subj S. 636 98th Congress Cost Estimate

1. This bill proposes to amend title 38, United States Code, to establish certain procedures for the adjudication of claims for benefits under laws administered by the Veterans' Administration; to apply the provisions of section 553 of title 5, United States Code, to rulemaking procedures of the Veterans' Administration; to provide for judicial review of certain final decisions of the Administrator of Veterans' Affairs; to provide for the payment of reasonable fees to attorneys for rendering legal representation to individuals claiming benefits under laws administered by the Veterans' Administration; and for other purposes.

2. The estimated caseload and cost is as follows:

FY	Cases Requiring Local Panel	Cases Remanded	Manyears	Administrative Cost ($000's)
1984	4,500	1,200	50	$1,227
1985	4,500	1,200	50	1,214
1986		1,200	12	371
1987		1,200	12	375
1988		1,200	12	377

3. The estimated benefit cost will be less than $1 million in any fiscal year.

John W. Starrs, Jr.
DOROTHY L. STARRUCK

METHODOLOGY

(A) S. 636 98th Congress

(B) This bill proposes to amend Title 38 U.S.C., to establish certain procedures for the adjudication of claims for benefits; to apply the provisions of section 553 of Title 5, U.S.C. to rulemaking procedures of the VA; to provide for judicial review of certain final decisions of the Administrator of Veterans Affairs; and for other purposes.

(C)&(D)

FY	Manyears	Administrative Cost ($000)
1984	50	$1,227
1985	50	1,214
1986	12	371
1987	12	375
1988	12	377

(E)

FY	Cases Requiring Local Panel	Cases Remanded
1984	4,500	1,200
1985	4,500	1,200
1986	...	1,200
1987	...	1,200
1988	...	1,200

(F) It was assumed 4,500 claimants would request a local hearing in each of the first two years. Hearings held in fiscal year 1980, which consisted of 3 adjudicators, averaged a total of 3.37 hours. This cost was used for the local hearings authorized in this bill. It was further assumed the adjudicators would spend a total of 1 hour prior to the hearing to review each case. In addition, the Centralized Transcription Activity time for the local hearings was estimated at 6.6 hours. The CTA's would be typing, proofing and assembling an average of 20 pages per hearing. The DVB cost for appealed BVA decisions was assumed to be the same as EP# 170. This cost will provide for additional "In house" review, and possible court appearances, etc. The following assumptions which were provided by BVA were also used to cost this bill:

35,200 Annual BVA caseload
58% of the cases would be denied
20,400 (rounded)
20% of the claimants would appeal BVA decisions
4,080
30% of the appealed cases would be remanded
1,200 (rounded)
15% of the remanded cases would be allowed by the courts
180

(G) All attorney fees and court costs which might be payable from G.O.E. would be charged to the General Counsel.

(H) S. 349 97th Congress was similar to this proposal. The difference in the estimates is the local hearing costs, which is now being costed on a 2-year study basis.

(I) Richard A. Smith, Alberto DiPompo, DVB Budget Staff (201E)

APPENDIX

COST METHODOLOGY

BOARD OF VETERANS' APPEALS

Impact Assessment - Judicial Review, S.367

I. General

A. Purpose. The purpose of this paper is to assess how judicial review under S.367, introduced on January 31, 1985, would impact upon the organization, operations, workload and costs of the Board of Veterans Appeals.

B. General Assumptions and Considerations. Certain broad assumptions and considerations were essential for the development of this impact assessment. Some of the more critical of these general assumptions are as follows:

1. The statutory limitation on the number of board members [38 USC 4001(a)] will remain at "not more than 65." This statutory ceiling effectively limits BVA organization to not more than 21 board sections. No other critical aspect of management/organization of the BVA is limited in this manner, and consequently, this ceiling is the controlling variable in most of the workload and cost estimates developed in this assessment. The most notable outcome associated with this assumption is a significant drop in decision output from the current service level and an equally significant rise in the BVA response time relative to the current service level. Since this resultant response time may be unacceptable, analysis in this impact assessment has been conducted under two approaches, as follows: (1) assuming that the 65 board member limitation will remain in effect; and (2) assuming that the 65 board member limitation will be lifted and that the BVA will be expected to perform at or near the current service level with respect to response time. Where assumptions, variables, and/or projections that pertain to the current service level analysis differ from those developed under the 65 board member constraint, they will be shown separately in reduced type size.

2. BVA decisions must continue to be responsive to appellants while meeting the requirements imposed by the courts. BVA decisions would have to be enlarged to include a detailed recitation of all evidence in order to permit the court to determine relevancy and commensurate weight. This will increase the average length of a BVA decision by 50% from 170 lines per decision to 255 lines per decision.

3. In the absence of a more appropriate model, certain experiences of the Social Security Administration's Office of Hearings and Appeals have been used to develop projections used in this impact assessment. The specific SSA data elements used for this purpose are as follows:

   - o Court filing rate as a percentage of SSA(BVA)denials: 20%
   - o Percentage of court filings remanded to SSA(BVA): 30%

4. The overall composition of BVA dispositions and receipts under judicial review will not vary significantly from the current composition. Significant factors are as follows:

   - o BVA denial rate: approximately 70%
   - o BVA remand to field rate: approximately 15%

- o Field rate of return to BVA of remands: approximately 75%
- o Receipts. The following rates are used for anticipated BVA workload receipts for FY 1986 and subsequent years:

  a. New Appeals: 36,900
  b. Nonoriginal Appeals (i.e., remands returned from field and reconsiderations): 3,500
  c. Court Remands: 1,300

Receipts, Current Service Level. At the current service level, BVA output rates are greater than under the 65 board member limitation. Since the overall number of dispositions are greater at the current service level, both the number of remands returned from the field and the number of court remands to the BVA will be proportionately greater. Projected receipts at the current service level are as follows:

a. New Appeals: 36,900
b. Nonoriginal Appeals (i.e., remands returned from the field and reconsiderations): 4,700
c. Court Remands: 1,750

C. Professional Staff Workrate Standards Impact. Due to increased complexity, more recitation of evidence, findings of fact, and conclusions of law, BVA decisions will require more development and review time.

1. Board Members. Workrate standards for board members will increase by 25% from 2.8356 standard hours per decision (FY 1984 actual) to 3.5445 standard hours per decision

2. Attorneys. Workrate standards for attorneys will increase by 50% from 5.5864 standard hours per decision to (FY 1984 actual) to 8.3796 standard hours per decision.

D. BVA Output Capacity.

1. Board Member Output Capacity. As described in paragraph B1, the total output limits of board members will form the overall disposition output limit for the BVA. Dispositions in this context include all BVA decisions and actions taken on cases remanded to the BVA from the courts. For computation purposes, time requirements for court remands have been estimated as equivalent to average time requirements for BVA decisions. The following formula has been used to project the maximum annual BVA disposition limit.

Maximum Annual Dispositions = Board Members Annual Hrs Available - adjusted workrate standards

Maximum Annual Dispositions = 32,500

Board Member Output Capacity, Current Service Level. This factor does not constitute an output limiting factor at a current service level of analysis.

2. Output Mix. The 32,500 dispositions per year output will be composed of BVA decisions and actions taken on remands from the courts. Court remands will require some priority, and annual BVA output in this category will equal annual receipts. The total BVA output mix can be expressed in the following formula:

Total BVA Output = No. of BVA Decisions + No. of Court Remands

The number of court remands can also be expressed as follows:

No. of court remands = No. of BVA Decisions x (BVA denial rate x Est. court filing rate x Est. court remand rate)
= No. BVA Decisions x [(.7) x (.2) x (.3)]

Combining these two formulas and inserting 32,500 as the total BVA Output figure results in the following projected output mix:

Total BVA Output = 32,500 dispositions per year
No of BVA Decisions = 31,200 per year
No. of Court Remands = 1,300 per year

Output Mix, Current Service Level. The current service level has been defined for the purpose of this analysis as that level of service which will maintain a BVA average response time at or near the current level. This means that BVA dispositions must be balanced against the expected level of receipts to maintain a relatively stable response time. This balance can be achieved with a BVA output of 43,350 dispositions, equaling the anticipated number of receipts, including court remands.

E. Workload and Response Time Estimates. Based upon the preceding assumptions and computations, the following is a composite portrayal of the estimated impact of the proposed legislation upon BVA workloads and response times:

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
Appeals Pending, start of Period	39,100	35,050	44,250	53,450	62,650	71,850
Appeals Received	+41,600	+40,400	+40,400	+40,400	+40,400	+40,400
Court Remand Rvcd.	+ --	+ 1,300	+ 1,300	+ 1,300	+ 1,300	+ 1,300
Total Workload	80,700	76,750	85,950	95,150	104,350	113,550
BVA Decisions	-45,650	-32,500	-32,500	-32,500	-32,500	-32,500
Appeals Pending, End of Period	35,050	44,250	53,450	62,650	71,850	81,050
Cases Chargeable to BVA	15,600	19,700	23,800	27,900	31,950	36,050
Avg BVA Response Time (days)	125	221	267	313	359	405

Workload and Response Time Estimates, Current Service Level.

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
Appeals Pending, Start	39,100	35,050	35,050	35,050	35,050	35,050
Appeals Rvcd.	+41,600	+41,600	+41,600	+41,600	+41,600	+41,600
Court Remands Received	+ --	+ 1,750	+ 1,750	+ 1,750	+ 1,750	+ 1,750
Total Workload	80,700	78,400	78,400	78,400	78,400	78,400
BVA Decisions	-45,650	-43,350	-43,350	-43,350	-43,350	-43,350
Appeals Pending, End	35,050	35,050	35,050	35,050	35,050	35,050
Cases Chargeable to BVA	15,600	15,600	15,600	15,600	15,600	15,600
Avg BVA Response Time (days)	125	131	131	131	131	131

F. Hearings. Formal hearings before the BVA do not presently occur with great frequency; only about 4% of BVA decisions currently entail formal hearings. With the advent of judicial review and accompanying increases in attorney representation, we anticipate significant increases in: (1) the overall percentage of BVA decisions entailing formal hearings; (2) the percentage of formal hearings for which transcripts will be required; and (3) the average length of a transcribed hearing.

1. Percentage of BVA decisions entailing formal hearings will rise from approximately 4% to approximately 10%.

2. Percentage of formal hearings for which transcripts will be required will rise from approximately 45% to approximately 90%.

3. Length of formal hearing transcripts will increase by 50% from 775 lines per hearing to 1160 lines per hearing.

G. Independent Medical Expert (IME) Opinions. §107 inserts language into 38 USC 4009 that we estimate would substantially increase the number of IME opinions required for BVA decisions. We estimate that approximately 3,000 BVA decisions per year will require IME opinions. The BVA currently obtains approximately 200-300 IME opinions annually, and some difficulty is occasionally experienced in obtaining medical schools' cooperation in furnishing this level of IME support. Some major revisions to the IME concept could be necessary to support a level of 3000 IME opinions annually.

1. In addition to the costs of the IME opinions, the following estimated increased workload requirements would result from the increased level of IME opinions.

   - Chief Members will need an additional .5 hours per IME opinion to formulate and review the request letter and to review and approve the adequacy of the opinion.

   - Attorneys will need one additional hour per case involving an IME opinion. This time is needed for research, preparation of the request, and incorporation of the opinion into the BVA decision.

- Each IME opinion will be approximately 60 lines long, and each BVA decision incorporating an IME opinion will be lengthened by approximately 60 lines.

Independent Medical Expert Opinions, Current Service Level. We estimate that the revised language of §107 would result in approximately 4,000 IME opinions at the current service level of performance.

H. Travel Board Alternative Examination. We estimate that the additional travel costs associated with examining the travel board alternatives of §109 would entail an additional $50,000 in annual travel costs for the period over which such a test would be conducted. The amount of board member time consumed with this test could effect their overall productivity.

II. Staffing and Costing

A. Staffing Impact

1. Organizational Structure of the BVA. In addition to a small management team in the Office of the Chairman, the BVA has two major components: (1) the Professional Service; and (2) the Administrative Service:

- Professional Service. The Professional Service consists of 21 similarly structured board sections. A typical board section has a chief member (attorney), a medical member (physician), a legal member (attorney), a staff of seven attorneys, and a secretary. Also included within the Professional Service are a number of medical advisers, the Appellate Index and Retrieval Staff (AIRS), and some additional clerical support. Medical Advisers provide advice to the Chairman and the board sections in specialty areas such as psychiatry, neurology, and cardiology. AIRS creates an index that includes each BVA decision, prepares a microfilm library of redacted (cleared of personal identifiers) decisions, and provides copies of the index and decisions to the public on request.

- Administrative Service. The Administrative Service maintains the BVA's docket of appeals and personal hearings and provides mail, correspondence, recording and transcription services, statistical reporting, and related support functions.

2. Changes Foreseen. Some basic assumptions regarding the affects upon the BVA of judicial review under S.367 were discussed in Part I. The following staffing composition changes and associated costs have been developed using those basic assumptions as departure points for all projections.

a. Professional Service. The most significant assumption relative to BVA Professional Service staffing under S.367 is that the statutory ceiling on board members will remain at 65. Professional and Administrative Service staffing projections have been

organized around this basic assumption. Other considerations central to developing Professional Service staffing changes are as follows:

- o Board section organization and work processes will remain similar to the current structure to ensure continuity and consistency in the BVA's operations and decisions.

- o The additional BVA work requirements revolving around responding to litigation and meeting increased IME opinion activity will be addressed through staffing changes in the BVA management and professional support groups rather than through alteration to the board section concept.

- o While the number of board members is capped at 65, revised attorney workrate standards discussed in Part I will require additional staff attorneys.

Using the assumptions described above, the total Professional Service staffing increase has been projected at a level of 23 FTEE, broken down as follows:

BVA Management Group:

1 Deputy Vice Chairman (Medical Affairs)
1 Deputy Vice Chairman (Litigation)
4 Legal Technicians (Litigation)

Attorney Staff:

12 Attorneys

Professional Support

2 Medical Advisors
2 AIRS indexers
1 AIRS editor

b. Administrative Service. In addition to the assumptions already discussed in Part I, the following assumptions have been used in projecting additional Administrative Service staffing needs.

- o Transcriptionist requirements will be affected by increases in the length of decisions, in the number of IME opinions, and in the number of formal hearings transcribed.

- o Hearing Section activities will be doubled, based upon the increased number of formal hearings.

- o Correspondence Section workrate standards will increase by 50% due to increased volumes of outside correspondence, increased correspondence complexity, increased records

development requirements, and increased records duplication requirements.

o Records and Docket Section workrate standards will increase by 50% due to increases in mail volumes, increased remand traffic, and increased precautionary administrative due process case reviews.

o Additional supervisory and administrative management staff will be required in proportion to projected clerical increases.

Using the assumptions described above, the total Administrative Service staffing increase has been projected at a level of 48 FTEE, broken down as follows:

Transcriptionists - 33
Records and Docket Section - 5
Correspondence Section - 5
Hearing Section - 2
Management Staff (Admin.) - 3

c. Staffing Changes Foreseen, Current Service Level. At the current service level the staffing changes foreseen can be more simply developed, since the statutory limitation on the number of board members is not taken into account for analysis purposes. The major staffing change at the current service level would be the addition of 8 board section slices (i.e., a board section slice consists of 3 board members, 7 staff attorneys, a section secretary, and roughly 9 administrative support personnel). In addition to the staff added by the increased number of section slices, there will be added staff attorneys, management group personnel, professional support personnel, and transcriptionists. A synopsis of the staffing increases at the current service level of performance is as follows:

160 FTEE - 8 Additional Board Section Slices
- 24 Board Members
- 56 Staff Attorneys
- 8 Section Secretaries
- 72 Administrative Support Personnel

6 FTEE - Additional Staff Attorneys

6 FTEE - BVA Management Group
- 1 Deputy Vice Chairman (Medical Affairs)
- 1 Deputy Vice Chairman (Litigation)
- 4 Legal Technicians (Litigation)

6 FTEE - Professional Support Group
- 2 Medical Advisors
- 3 AIRS Indexers
- 1 AIRS Editor

25 FTEE - Additional Transcriptionists

B. Non-Personnel Cost Impact. Additional BVA Costs other than personal services associated with S.367 include:

1. IME opinion costs
2. Office equipment for added personnel (one-time cost)
3. Furniture/furnishings for added personnel
4. Training and supplies to support added personnel
5. Travel costs (shown separately in Cost Summary)

C. Cost Summary.

1. Considerations. Cost projections have been developed on the assumption that all changes associated with implementing S.367 would be made effective during Fiscal Year 1986. Payroll costs are incremented at one-percent annually. Other costs are increased using inflation rates prescribed for VA planning and budget estimates for FY 1986 - 1990. No costs have been shown for objects not included in BVA budget (i.e., office space, telecommunications, utilities and similar housekeeping costs). All costs shown are increments above current BVA budget estimates.

2. Cost Estimates. (in thousands)

Object	FY 1986	FY 1987	FY 1988	FY 1989	FY 1990
Personal Services	$1,958	$1,977	$1,997	$2,017	$2,037
Operating Costs					
One-time	232	-			
Recurring	690	720	748	776	805
Travel	50	52	54	56	58
Total Costs	$2,930	$2,749	$2,799	$2,849	$2,900

3. Cost Estimates, Current Service Level. (in thousands)

Object	FY 1986	FY 1987	FY 1988	FY 1989	FY 1990
Personal Svcs.	$7,105	$7,176	$7,248	$7,320	$7,393
Operating Costs					
one-time	673				
recurring	1,061	1,106	1,150	1,193	1,234
Travel	50	52	54	56	58
Total Costs	$8,889	$8,334	$8,452	$8,569	$8,685

GENERAL COUNSEL

JUDICIAL REVIEW METHODOLOGY

1. From BVA cost estimate on S. 367 :
   Annual appeals processed = 32,500
   BVA denial rate = 70 percent

2. The experience of the Social Security Administration's Bureau of Hearings and Appeals is that about 20% of denied appeals will be asserted for judicial review.

3. The organization structure of the Office of General Counsel will be similar to that required for handling of tort actions. Primary responsibility will rest with District Counsel offices and oversight provided by Central Office. Central Office will also handle Constitutional cases.

4. Preparation and court time will require approximately 24 attorney hours per case and support (clerical) time will consume about 18 hours per case.

5. A productive workyear is assumed to be 1,534 hours (net of leave and administrative requirements).

6. First year (non-recurring) costs for each new employee will be $1,000. This is for desks, chairs, telephones and office equipment.

7. Recurring costs of office supplies, replacement equipment, etc. will be $700 per FTEE. Travel for this program will be approximately $22,000 per year for training and litigation.

8. Salaries are computed at step 4, benefits assumed at 11% of salary (historical ratio).

ARW
5/13/85

GENERAL COUNSEL

COST ESTIMATE

JUDICIAL REVIEW
S. 367, 99th Congress

BVA appeals	32,500 per year	EMPLOYMENT	
70% denials	22,750 " "	GM-15 - 1	C.O.
		GM-14 - 2	
20% to Judicial	4,550 " "	GS- 5 - 1	
		GS-11 - 71	Field
		GS- 5 - 54	

24 attorney manhours/case ...	109,200 manhours ...	71	FTEE
18 support manhours/case ...	81,900 manhours ...	54	"
		125	" field
		4	" C.O.
FTEE required		129	

(based on 1534 productive manhours/FTEE/year)

Salary Base:

GM-15 $57,488 GM-14 $48,873 GS-11 $29,018 GS-5 $15,830

Dollars in 000's	1986	1987	1988	1989	1999
Salaries & benefits	$3,425.6	$3,459.9	$3,494.5	$3,529.4	$3,564.7
Non-recurring	129.0	...	...	...	...
Recurring	90.3	90.3	90.3	90.3	90.3
Travel	22.0	22.0	22.0	22.0	22.0
TOTAL COST	$3,666.9	$3,572.2	$3,606.8	$3,641.7	$3,677.0

ARW
5/13/85

GENERAL COUNSEL

COST ESTIMATE

JUDICIAL REVIEW
S. 367, 99th Congress

(CURRENT SERVICES LEVEL)

BVA appeals	40,000 per year	EMPLOYMENT	
70% denials	28,000 " "	GM-15 - 1	C.O.
		GM-14 - 2	
20% to Judicial	5,600 " "	GS- 5 - 1	
		GS-11 - 88	Field
		GS- 5 - 66	

24 attorney manhours/case ...	176,400 manhours ...	88	FTEE
18 support manhours/case ...	100,800 manhours ...	66	"
		154	" field
		4	" C.O.
FTEE required		158	

(based on 1534 productive manhours/FTEE/year)

Salary Base:

GM-15 $57,488 GM-14 $48,873 GS-11 $29,018 GS-5 $15,830

Dollars in 000's	1986	1987	1988	1989	1999
Salaries & Benefits	$4,184.1	$4,225.9	$4,268.2	$4,310.9	$4,354.0
Non-recurring	158.0	...	...	...	...
Recurring	110.6	110.6	110.6	110.6	110.6
Travel	24.0	24.0	24.0	24.0	24.0
TOTAL COST	$4,476.7	$4,360.5	$4,402.8	$4,445.5	$4,488.6

ARW
5/8/85

GENERAL COUNSEL

JUDICIAL REVIEW METHODOLOGY

1. From BVA cost estimate on H.R. 313 (similar bill):
   Annual appeals processed = 40,000
   BVA denial rate = 70 percent

2. The experience of the Social Security Administration's Bureau of Hearings and Appeals is that about 20% of denied appeals will be asserted for judicial review.

3. The organization structure of the Office of General Counsel will be similar to that required for handling of tort actions. Primary responsibility will rest with District Counsel offices and oversight provided by Central Office. Central Office will also handle Constitutional cases.

4. Preparation and court time will require approximately 24 attorney hours per case and support (clerical) time will consume about 18 hours per case.

5. A productive workyear is assumed to be 1,534 hours (net of leave and administrative requirements).

6. First year (non-recurring) costs for each new employee will be $1,000. This is for desks, chairs, telephones and office equipment.

7. Recurring costs of office supplies, replacement equipment, etc. will be $700 per FTEE. Travel for this program will be approximately $24,000 per year for training and litigation.

8. Salaries are computed at step 4, benefits assumed at 11% of salary (historical ratio).

ARW
5/8/85

Veterans Administration

Memorandum

Date MAY 24 1985

To Deputy Assistant General Counsel (022A)
THRU: Director, Office of Budget and Finance (04)

From Acting Chief Benefits Director (201E)

Subj Revised Cost Estimate S. 367, 99th Congress, 1st Session

1. This bill proposes to amend title 38, United States Code, to establish certain procedures for the adjudication of claims for benefits under laws administered by the Veterans' Administration; to apply the provisions of section 553 of title 5, United States Code, to rulemaking procedures of the Veterans' Administration; to provide for judicial review of certain final decisions of the Administrator of Veterans' Affairs; to provide for the payment of reasonable fees to attorneys for rendering legal representation to individuals claiming benefits under laws administered by Veterans' Administration; and for other purposes.

2. As requested by the Office of Budget and Finance (041D), we have recosted the subject proposal using the latest Board of Veterans Appeals assumptions. The revised five year cost to the Department of Veterans Benefits is as follows:

Fiscal Year	Judicial Review Appeals	Man Years	Administrative Cost ($000)	Benefit Cases	Benefit Cost ($000's)
1986	4,368	156	$4,138	1,100	$27,720
1987	4,368	134	3,576	2,200	35,640
1988	4,368	84	2,368	3,300	43,560
1989	4,368	84	2,390	4,400	51,480
1990	4,368	84	2,413	5,500	59,400
			$14,885		$217,800

John W. Hagan Jr

JOHN W. HAGAN, JR

METHODOLOGY

A) Identification of Bill - S. 367, 99th Congress

B) Highlights - This bill proposes to amend title 38, United States Code, to establish certain procedures for the adjudication of claims for benefits under laws administered by the Veterans' Administration; to apply the provisions of section 553 of title 5, United States Code, to rulemaking procedures of the Veterans' Administration; to provide for the judicial review of certain final decisions of the Administrator of Veterans' Affairs; to provide for the payment of reasonable fees to attorneys for rendering legal representation to individuals claiming benefits under laws administered by the Veterans' Administration; and for other purposes.

C) Estimated five-year cost - See Memo

D) Employment Requirements - See Memo

E) Change in work units or caseload

Fiscal Year	Cases requiring Local Panel	Cases Remanded
1986	4,500	1,300
1987	4,500	1,300
1988	...	1,300
1989	...	1,300
1990	...	1,300

Administrative Methodology

F) Methodology - It was assumed 4,500 claimants would request a local hearing each year during the two year test period. These hearings, which consist of three employees whose primary responsibilities include adjudicative functions, were estimated to average a total of nine hours. This includes time prior to the hearings to review each case. In addition, the Centralized Transcription Activity time was estimated at 6.6 hours to type, proof and assemble an average of twenty pages per hearing. We have also estimated that a 25% increase in formal hearings would result each year. The formal hearings were estimated to take the same amount of time to conduct as the local hearings. Additionally, informal hearings were estimated to increase by 3,000 in 1986 and 2,000 in subsequent years. These informal hearings would average two hours and would not require typing. Based on conversations with members of the C&P service it was estimated that an additional 15 hours of work would be generated in DVB for each BVA decision which would be appealed to the courts. The remanded cases were costed using end product #120. The rulemaking changes were estimated at $75,000 in the first year and $50,000 in subsequent years.

The following caseload assumptions were used in costing this bill:

31,200	Annual BVA decisions
70%	of the cases would be denied.
21,840	
20%	of the claimants will appeal BVA decisions.
4,368	
30%	remanded by the court
1,300	remanded cases (rounded down)

Benefit Methodology

The benefit cost for this proposal assumes that 25% of those cases seeking judicial review will be decided in favor of the claimant. The average retro payment was assumed to cover a three year period prior to the decision. The average retro payment was assumed to be $21,600, and the average annual payment per case in the outyears would be $7,200.

G) Other Assumptions - (1) Personal appearances in court by DVB employees will not be necessary.

(2) BVA will supply the name, address and the appealable issue of denied BVA decisions.

(3) In costing this proposal versus previous judicial review bills we assumed a greater caseload would be affected, at higher average benefit payments, and that there would be retro payments. The increased caseload is in part the result of a higher estimated caseload seeking judicial review as assumed by the Board of Veteran Appeals (BVA). In previous estimates we did not estimate the cases reversed by the courts, just those reversed by VA.

(4) Assumes the BVA will operate at a 65 board level cap.

H) Previous Estimates - HR 798 and HR 1270 97th Congress.

I) Office and Individual Responsible for estimate - Richard Smith, Steve McLaughlin DVB Budget Staff (201E)

Veterans Administration

Memorandum

Date: MAR 25 1985

To: Deputy Assistant General Counsel (022A)
THRU: Director, Office of Budget and Finance (04)

From: Acting Chief Benefits Director (201E)

Subj: Cost Estimate S. 367, 99th Congress, 1st Session (CURRENT SERVICE LEVEL)

1. This bill proposes to amend title 38, United States Code, to establish certain procedures for the adjudication of claims for benefits under laws administered by the Veterans' Administration; to apply the provisions of section 553 of title 5, United States Code, to rulemaking procedures of the Veterans' Administration; to provide for judicial review of certain final decisions of the Administrator of Veterans' Affairs; to provide for the payment of reasonable fees to attorneys for rendering legal representation to individuals claiming benefits under laws administered by the Veterans' Administration; and for other purposes.

2. The estimated five year cost to the Department of Veterans Benefits is as follows:

Fiscal Year	Judicial Review Appeals	Man Years	Administrative Cost ($000)	Benefit Cases	Benefit Cost ($000's)
1986	9,450	202	$ 5,418	2,400	$ 60,500
1987	6,300	151	4,058	4,000	57,600
1988	6,300	101	2,855	5,500	66,600
1989	6,300	101	2,882	7,100	80,000
1990	6,300	101	2,909	8,700	91,400
			$18,122		$356,100

John W. Hagan, Jr.

JOHN W. HAGAN, JR.

Methodology

A) Identification of Bill - S. 367, 99th Congress

B) Highlights - This bill proposes to amend title 38, United States Code, to establish certain procedures for the adjudication of claims for benefits under laws administered by the Veterans' Administration; to apply the provisions of section 553 of title 5, United States Code, to rulemaking procedures of the Veterans' Administration; to provide for the judicial review of certain final decisions of the Administrator of Veterans' Affairs; to provide for the payment of reasonable fees to attorneys for rendering legal representation to individuals claiming benefits under laws administered by the Veterans' Administration; and for other purposes.

C) Estimated five-year cost - See Memo

D) Employment Requirements - See Memo

E) Change in work units or caseload

Fiscal Year	Cases requiring Local Panel	Cases Remanded
1986	4,500	2,835
1987	4,500	1,890
1988	...	1,890
1989	...	1,890
1990	...	1,890

Administrative Methodology

F) Methodology - It was assumed 4,500 claimants would request a local hearing each year during the two year test period. These hearings, which consist of three employees whose primary responsibilities include adjudicative functions, were estimated to average a total of nine hours. This includes time prior to the hearings to review each case. In addition, the Centralized Transcription Activity time was estimated at 6.6 hours to type, proof and assemble an average of twenty pages per hearing. We have also estimated a 25% increase in formal hearings would result each year. The formal hearings were estimated to take the same amount of time to conduct as the local hearings. Additionally, informal hearings were estimated to increase by 3000 in 1986 and 2000 in subsequent years. These informal hearings would average two hours and would not require typing. Based on conversations with members of the C&P service it was estimated that an additional 15 hours of work would be generated in DVB for each BVA decision which would be appealed to the courts. The remanded cases were costed using end product #120. The rulemaking changes were estimated at $75,000 in the first year and $50,000 in subsequent years.

The following caseload assumptions were used in costing this bill:

45,000	Annual BVA caseload 1/
70%	of the cases would be denied.
31,500	
20%	of the claimants will appeal BVA decisions.
6,300	
30%	remanded by the court
1,890	

1/ This caseload was increased by 22,500 in the first year due to the retroactive provisions contained in the bill.

Benefit Methodology

The benefit cost for this proposal assumes that 25% of those cases seeking judicial review will be decided in favor of the claimant. The average retro payment was assumed to cover a three year period prior to the decision. The average retro payment was assumed to be $21,600, and the average annual payment per case in the outyears would be $7,200.

G) Other Assumptions - (1) Personal appearances in court by DVB employees will not be necessary.

(2) BVA will supply the name, address and the appealable issue of denied BVA decisions.

(3) In costing this proposal versus previous judicial review bills we assumed a greater caseload would be affected, at higher average benefit payments, and that there would be retro payments. The increased caseload is in part the result of a higher estimated caseload seeking judicial review as assumed by the Board of Veteran Appeals (BVA). In previous estimates we did not estimate the cases reversed by the courts, just those reversed by VA.

H) Previous Estimates - HR 798 and HR 1270 97th Congress

I) Office and Individual Responsible for estimate Richard Smith, Steve McLaughlin DVB Budget Staff (20IE)

CHANGES IN EXISTING LAW MADE BY S. 367 AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

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PART IV—JURISDICTION AND VENUE

* * * * * * *

CHAPTER 85—DISTRICT COURTS; JURISDICTION

Sec.

* * * * * * *

§ 1346. United States as defendant

(a) * * *

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(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension, *except as provided for in subchapter II of chapter 71 of title 38.*

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TITLE 38—VETERANS' BENEFITS

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CHAPTERS OF TITLE 38

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PART IV. GENERAL ADMINISTRATIVE PROVISIONS

CHAPTER

51. [APPLICATIONS] *CLAIMS,* EFFECTIVE DATES, AND PAYMENTS.
53. SPECIAL PROVISIONS RELATING TO BENEFITS.
55. MINORS, INCOMPETENTS, AND OTHER WARDS.
57. RECORDS AND INVESTIGATIONS.
59. AGENTS AND ATTORNEYS.
61. PENAL AND FORFEITURE PROVISIONS.

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SUBCHAPTER II.—ADMINISTRATOR OF VETERANS' AFFAIRS

210. Appointment and general authority of Administrator; Deputy Administrator.
211. Decisions by Administrator; opinions of Attorney General.
212. Delegation of authority and assignment of duties.
213. Contracts and personal services.
214. Reports to the Congress.
215. Publication of laws relating to veterans.
217. Studies of rehabilitation of disabled persons.
218. Security and law enforcement on property under the jurisdiction of the Veterans' Administration.
219. Evaluation and data collection.
220. Coordination and promotion of other programs affecting veterans and their dependents.
221. Advisory Committee on Former Prisoners of War.
222. Advisory Commmittee on Women Veterans.
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PART IV. GENERAL ADMINISTRATIVE PROVISIONS

CHAPTER 51.—APPLICATIONS, EFFECTIVE DATES, AND PAYMENTS

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3001. Claims and forms.
3002. Application forms furnished upon request.
3003. Incomplete applications.
3004. [REPEALED.]
3005. Joint applications for social security and dependency and indemnity compensation.
3006. Furnishing of information by other agencies.
3007. Burden of proof; benefit of the doubt.

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4029. Appellate review.

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TITLE 38—UNITED STATES CODE

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PART I—GENERAL PROVISIONS

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CHAPTER 3—VETERANS' ADMINISTRATION; OFFICERS AND EMPLOYEES

SUBCHAPTER I—VETERANS' ADMINISTRATION

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201. Veterans' Administration an independent agency.
202. Seal of the Veterans' Administration.
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218. Security and law enforcement on property under the jurisdiction of the Veterans' Administration.
219. Evaluation and data collection.
220. Coordination and promotion of other programs affecting veterans and their dependents.
221. Advisory Committee on Former Prisoners of War.
222. Advisory Committee on Women Veterans.
223. Rule making.

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Subchapter II—Administrator of Veterans' Affairs

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§ 211. Decisions by Administrator; opinions of Attorney General

(a) On and after October 17, 1940, except as provided in section [775, 784,] *775 and 784 and subchapter II of chapter 71 of this title,* and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the

United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

* * * * * * *

§ 222. Advisory Committee on Women Veterans

(d) * * *

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(3) The Administrator shall submit with each annual report submitted to the Congress pursuant to section 214 of this title a summary of all reports and recommendations of the Committee submitted to the Administrator since the previous annual report of the Administrator submitted pursuant to such section.

§ 223. Rule making

Notwithstanding the provisions of subsection (a)(2) of section 553 of title 5, the promulgation of rules and regulations by the Administrator, other than rules or regulations pertaining to agency management or personnel or to public property or contracts, shall be subject to the requirements of section 553 of title 5.

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PART IV—GENERAL ADMINISTRATIVE PROVISIONS

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CHAPTER 51—[APPLICATIONS] *CLAIMS,* EFFECTIVE DATES, AND PAYMENTS

SUBCHAPTER I—[APPLICATIONS] *CLAIMS*

Sec.
3001. Claims and forms.
3002. Applications forms furnished upon request.
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3004. [REPEALED.]
3005. Joint applications for social security and dependency and indemnity compensation.
3006. Furnishing of information by other agencies.
3007. Burden of proof; benefit of the doubt.

* * * * * * *

Subchapter I—[Applications] *Claims*

§ 3001. Claims and forms

(a) * * *

* * * * * * *

§ 3007. Burden of proof; benefit of the doubt

(a) Except when otherwise provided by the Administrator in accordance with the provisions of this title, a claimant for benefits under laws administered by the Veterans' Administration shall have the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded. The Administrator shall assist a claimant in developing the facts pertinent to his or her claim.

(b) When, after consideration of all evidence and material of record in any proceeding before the Veterans' Administration involving a claim for benefits under laws administered by the Veterans' Administration, there is an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of such claim, the benefit of the doubt in resolving each such issue will be given to the claimant, but nothing in this section shall be construed as shifting from a claimant to the Administrator the burden described in subsection (a) of this section.

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Subchapter II—Effective Dates

§ 3010. Effective dates of awards

(a) * * *

* * * * * * *

(i)*(1)* Whenever any disallowed claim is reopened and thereafter allowed on the basis of new and material evidence resulting from the correction of the military records of the proper service department under section 1552 of title 10, or the change, correction, or modification of a discharge or dismissal under section 1553 of title 10, or from other corrective action by competent authority, the effective date of commencement of the benefits so awarded shall be the date on which an application was filed for correction of the military record or for the change, modification, or correction of a discharge or dismissal, as the case may be, or the date such disallowed claim was filed, whichever date is the later, but in no event shall such award of benefits be retroactive for more than one year from the date of reopening of such disallowed claim. This subsection shall not apply to any application or claim for Government life insurance benefits.

(2) Whenever any disallowed claim is reopened and thereafter allowed on the basis of new and material evidence in the form of official reports from the proper service department, the effective date of commencement of the benefits so awarded shall be the date on which an award of benefits under the disallowed claim would have been effective had the claim been allowed on the date it was disallowed.

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CHAPTER 57—RECORDS AND INVESTIGATIONS

* * * * * * *

Subchapter II—Investigations

§ 3311. Authority to issue subpenas

For the purposes of the laws administered by the Veterans' Administration, the Administrator, and those employees to whom the Administrator may delegate such authority, to the extent of the authority so delegated, shall have the power to issue subpenas for and compel the attendance of witnesses within a radius of one hundred miles from the place of hearing, to require the production of books, papers, documents, and other evidence, to take affidavits, to administer oaths and affirmations, to aid claimants in the preparation and presentation of claims, and to make investigations and examine witnesses upon any matter within the jurisdiction of the Veterans' Administration. Any person required by such subpena to attend as a witness shall be allowed and paid the same fees and mileage as are paid witnesses in the district courts of the United States. *Subpenas authorized under this section shall be served by any individual authorized by the Administrator by (1) delivering a copy thereof to the individual named therein, or (2) mailing a copy thereof by registered or certified mail addressed to such individual at such individual's last known dwelling place or principal place of business. A verified return by the individual so serving the subpena setting forth the manner of service, or, in the case of service by registered or certified mail, the return post office receipt therefor signed by the individual so served shall be proof of service.*

* * * * * * *

CHAPTER 59—AGENTS AND ATTORNEYS

* * * * * * *

§ 3404. Recognition of agents and attorneys generally

(a) The Administrator may recognize any individual as an agent or attorney for the preparation, presentation, and prosecution of claims under laws administered by the Veterans' Administration. The Administrator may require that individuals, before being recognized under this section, show that they are of good moral character and in good repute, are qualified to render claimants valuable service, and otherwise are competent to assist claimants in presenting claims.

(b) The Administrator, after notice and opportunity for a hearing, may suspend or exclude from further practice before the Veterans' Administration any agent or attorney recognized under this section if he finds that such agent or attorney—

(1) has engaged in any unlawful, unprofessional, or dishonest practice;

(2) has been guilty of disreputable conduct;

(3) is incompetent;

(4) has violated or refused to comply with any of the laws administered by the Veterans' Administration, or with any of the regulations or instructions governing practice before the Veterans' Administration; or

(5) has in any manner deceived, misled, or threatened any actual or prospective claimant.

[(c) The Administrator shall determine and pay fees to agents or attorneys recognized under this section in allowed claims for monetary benefits under laws administered by the Veterans' Administration. Such fees—

[(1) shall be determined and paid as prescribed by the Administrator.

[(2) shall not exceed $10 with respect to any one claim; and

[(3) shall be deducted from monetary benefits claimed and allowed.]

(c) The Administrator shall approve reasonable attorneys' fees to be paid by the claimant to attorneys for representation before the Veterans' Administration in connection with a claim for benefits under laws administered by the Veterans' Administration, but in no event shall such attorneys' fees exceed—

(1) for any claim resolved prior to or at the time that a final decision of the Administrator is first rendered, $10; or

(2) for any claim resolved after such time—

(A) if the claimant and an attorney have entered into an agreement under which no fee is payable to such attorney unless the claim is resolved in a manner favorable to the claimant, 25 percent of the total amount of any past-due benefits awarded on the basis of the claims; or

(B) if the claimant and an attorney have not entered into such an agreement, the lesser of—

(i) the fee agreed upon by the claimant and the attorney; or

(ii) $500, or such greater amount as may be specified from time to time in regulations which the Administrator shall prescribe based on changed national economic conditions subsequent to the date of enactment of this subsection, except that the Administrator may, in the Administrator's discretion, determine and approve a fee in excess of $500, or such greater amount if so specified in an individual case involving extraordinary circumstances warranting a higher fee.

(d)(1) If, in an action brought under section 4025 of this title, the matter is resolved in a manner favorable to a claimant who was represented by an attorney, the court shall determine and allow a reasonable fee for such representation to be paid to the attorney by the claimant. When the claimant and an attorney have entered into an agreement under which the amount of the fee payable to such attorney is to be paid from any past-due benefits awarded on the basis of the claim and the amount of the fee is contingent on whether or not the matter is resolved in a manner favorable to the claimant, the fee so determined and allowed shall not exceed 25 percent of the total amount of any past-due benefits awarded on the basis of the claim.

(2) If, in an action brought under section 4025 of this title, the matter is not resolved in a manner favorable to the claimant, the court, taking into consideration the likelihood at the time such action was filed that the claimant would prevail, may determine and allow a reasonable fee not in excess of $750 to be paid to the attorney by the claimant for the representation of such claimant.

(e) To the extent that past-due benefits are awarded in proceedings before the Administrator or a court, the Administrator shall direct that payment of any attorneys' fee that has been determined and allowed under this section be made out of such past-due benefits, but in no event shall the Administrator withhold for the purpose of such payment any portion of benefits payable for a period subsequent to the date of the final decision of the Administrator or court making such award.

(f) The provisions of this section shall apply only to cases involving claims for benefits under the laws administered by the Veterans' Administration, and such provisions shall not apply in cases in which the Veterans' Administration is the plaintiff or in which other attorneys' fee statutes are applicable.

(g) For the purposes of this section—

(1) the terms "final decision of the Administrator" and "claim for benefits" shall have the same meaning provided for such terms, respectively, in section 4025(a) of this title; and

(2) claims shall be considered as resolved in a manner favorable to the claimant when all or any part of the relief sought is granted.

(h) In an action brought under section 4025 of this title, the court may award to a prevailing party, other than the Administrator, reasonable attorneys' fees and costs in accordance with the provisions of subsection (d) of section 2412 of title 28, as in effect on the day before the effective date of the repeal of such subsection (as provided in section 204(c) of the Equal Access to Justice Act (Public Law 96-481; 94 Stat. 2329; 28 U.S.C. 2412 note)).

§ 3405. Penalty for certain acts

Whoever (1) directly or indirectly solicits, contracts for, charges, or receives or attempts to solicit, contract for, charge, or receive, any fee or compensation except as provided in section 3404 or 784 of this title [or] (2) wrongfully withholds from any claimant or beneficiary any part of a benefit or claim allowed and due [him] *such claimant or beneficiary, or (3) with intent to defraud, in any manner willfully and knowingly deceives, misleads, or threatens a claimant or beneficiary or prospective claimant or beneficiary under this title with reference to any matter covered by this title,* shall be fined not more than $500, or imprisoned at hard labor for not more than two years, or both.

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PART V—BOARDS AND DEPARTMENTS

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CHAPTER 71—BOARD OF VETERANS' APPEALS

SUBCHAPTER I—GENERAL

Sec.
4001. Composition of Board of Veterans' Appeals.
4002. Assignment of members of Board.
4003. Determinations by the Board.
4004. Jurisdiction of the Board.

4005. Filing of notice of disagreement and appeal.
4005A. Simultaneously contested claims.
4006. Administrative appeals.
4007. Docketing of appeals.
4008. Rejection of applications.
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4010. Adjudication procedures.
4011. Notice of procedural rights.

SUBCHAPTER II—JUDICIAL REVIEW

4025. Right of review; commencement of action.
4026. Scope of review.
4027. Remands.
4028. Survival of actions.
4029. Appellate review.

Subchapter I—General

§ 4001. Composition of Board of Veterans' Appeals

(a) There shall be in the Veterans' Administration a Board of Veterans' Appeals (hereinafter in this chapter referred to as the "Board") under the administrative control and supervision of a chairman directly responsible to the Administrator. The Board shall consist of a Chairman, a Vice Chairman, such number (not more than 65) of members as may be found necessary, and such other professional, administrative, clerical, and stenographic personnel as are necessary in conducting hearings and considering and disposing of appeals properly before the Board *in a timely manner.*

(b) Members of the Board (including the Chairman and Vice Chairman) shall be appointed by the Administrator with the approval of the President.

(c)(1) Subject to paragraph (2) of this subsection, the Chairman may from time to time designate employees of the Veterans' Administration to serve as temporary members of the Board. Any such designation shall be for a period of not to exceed one year, as determined by the Chairman. An individual may not serve as a temporary member of the Board for more than 24 months during any 48-month period.

(2) Designation under paragraph (1) of this subsection of an individual as a temporary member of the Board may not be made when there are fewer than 65 members of the Board.

(3) In each annual report to the Congress under section 214 of this title, the Administrator shall provide detailed descriptions of the activities undertaken and plans made in the fiscal year for which the report is made with respect to the authority provided by paragraph (1) of this subsection. In each such report, the Administator shall indicate, in terms of full-time employee equivalents, the number of temporary Board members designated under this subsection and the number of acting Board members designated under section 4002(a)(2)(A)(ii) of this title during the year for which the report is made.

(d) The Chairman of the Board shall submit a report to the appropriate committees of the Congress, not later than December 31, 1986, and annually thereafter, on the experience of the Board during the prior fiscal year together with projections for the fiscal year in which the report is submitted and the subsequent fiscal

year. Such report shall contain, as a minimum, information specifying the number of cases appealed to the Board during the prior fiscal year, the number of cases pending before the Board at the beginning and end of such fiscal year, the number of such cases which were filed during each of the 24 months preceding the prior fiscal year and the then current fiscal year, respectively, the average length of time a case was before the Board between the time of the filing of an appeal and the disposition during the prior fiscal year, and the number of members of, and the professional, administrative, clerical, stenographic, and other personnel employed by, the Board at the end of the prior fiscal year. The projections for the current fiscal year and subsequent fiscal year shall include, for each such year, estimates of the number of cases to be appealed to the Board and an evaluation of the Board's ability, based on existing and projected personnel levels, to ensure timely disposition of such appeals as provided for by subsection (a) of this section.

* * * * * * *

§ 4003. Determinations by the Board

(a) The determination of the section, when unanimously concurred in by the members of the section shall be the final determination of the Board, except that the Board on its own motion may correct an obvious error in the record, or may upon the basis of additional official information from the service department concerned, *after notice of such additional information is furnished to the claimant and the claimant is provided an opportunity to be heard in connection with such information,* reach a contrary conclusion.

(b) **[**When**]** *(1) Except as provided in paragraph (2), when* there is a disagreement among members of the section the concurrence of the Chairman with the majority of members of such section shall constitute the final determination of the Board, except that the Board on its own motion may correct an obvious error in the record, or may upon the basis of additional official information from the service department concerned, *after notice of such additional information is furnished to the claimant and the claimant is provided an opportunity to be heard in connection with such information,* reach a contrary conclusion.

(2) When, without the vote of a temporary member designated under section 4001(c)(1) of this title or the vote of an acting member designated under section 4002(a)(2)(A)(ii) of this title, a section would be evenly divided, such member shall not vote.

§ 4004. Jurisdiction of the Board

(a) All questions on claims **[**involving**]** *for* benefits under the laws administered by the Veterans' Administration shall be subject to one review on appeal to the Administrator. Final decisions on such appeals shall be made by the Board *after affording the claimant an opportunity for a hearing and shall be based exclusively on evidence and material of record in the proceeding and on applicable provisions of law.*

[(b) When a claim is disallowed by the Board, it may not thereafter be reopened and allowed, and no claim based upon the same

factual basis shall be considered; however, where subsequent to disallowance of a claim, new and material evidence in the form of offical reports from the proper service department is secured, the Board may authorize the reopening of the claim and review of the former decision.]

(b)(1) Except as provided in paragraph (2) of this subsection, when a claim is disallowed by the Board, it may not thereafter be reopened and allowed and no claim based upon the same factual basis shall be considered.

(2) Following such a disallowance, the Board (directly or through the agency of original jurisdiction, as described in section 4005(b)(1) of this title)—

(A) when new and material evidence is secured, shall, and

(B) for good cause shown, may authorize the reopening of a claim and review of the Board's former decision.

(3) A judicial decision under subchapter II of chapter 71 of this title upholding, in whole or in part, the disallowance of a claim shall not diminish the Board's authority set forth in paragraph (2) of this subsection to authorize the reopening of a claim and a review of the former decision.

(c) The Board shall be bound in its decisions by the regulations of the Veterans' Administration, instructions of the Administrator, and the precedent opinions of the chief law officer.

[(d) The decisions of the Board shall be in writing and shall contain findings of fact and conclusions of law separately stated.]

(d) After reaching a decision in a case, the Board shall promptly mail notice of its decision to the claimant and the claimant's authorized representative, if any, at the last known address of the claimant and at the last known address of the claimant's authorized representative, if any. Each decision of the Board shall include—

(1) a written statement of the Board's findings and conclusions, and reasons or bases therefor, on all material issues of fact and law and on matters of discretion presented on the record; and

(2) an order granting appropriate relief or denying relief.

§ 4005. Filing of notice of disagreement and appeal

(d) * * *

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(5) The Board of Veterans' Appeal [will base its decision on the entire record and] may dismiss any appeal which fails to allege specific error of fact or law in the determination being appealed.

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§ 4009. Independent medical opinions

(a) When, in the judgment of the Board, expert medical opinion, in addition to that available within the Veterans' Administration, is warranted by the medical complexity or controversy involved in an appeal case, the Board is authorized to secure an advisory medical opinion from one or more independent medical experts who are not employees of the Veterans' Administration.

(b) The Administrator shall make necessary arrangements with recognized medical schools, universities, or clinics to furnish such advisory medical opinions at the request of the Chairman of the Board. Such arrangement will provide that the actual selection of the expert or experts to give the advisory opinion in any individual case will be made by an appropriate official of such institution.

(c) Whenever there exists in the evidence of record in an appeal case a substantial disagreement between the substantiated findings or opinions of two physicians with respect to an issue material to the outcome of the case, the Board shall, upon the request of the claimant and after taking appropriate action to attempt to resolve the disagreement, arrange for an advisory medical opinion in accordance with the procedure prescribed in subsection (b) of this section. If the Board denies the request of such claimant for such an opinion, the Board shall prepare and provide to the claimant and the claimant's authorized representative, if any, a statement setting forth the basis for its determination. Actions of the Board under this subsection, including any such denial, shall be final and conclusive, and no other official or any court of the United States shall have the power or jurisdiction to review any aspect of any such decision by an action in the nature of mandamus or otherwise, the provisions of subchapter II of chapter 71 of this title to the contrary notwithstanding.

§ 4010. Adjudication procedures

(a) For purposes of conducting any hearing, investigation, or other proceeding in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration, the Administrator may administer oaths and affirmations, examine witnesses, and receive evidence.

(b) Any oral, documentary, or other evidence, even though inadmissible under the rules of evidence applicable to judicial proceedings, may be admitted in a hearing, investigation, or other proceeding in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration, but the Administrator, under regulations which the Administrator shall prescribe, may provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.

(c)(1) In the course of any proceeding before the Board, any party to such proceeding or such party's authorized representative shall be afforded opportunity—

(A) to examine and, on payment of a fee prescribed pursuant to section 3302(b) of this title (not to exceed the direct cost of duplication), obtain copies of the contents of the case files and all documents and records to be used by the Veterans' Administration at such proceeding;

(B) to present witnesses and evidence, subject only to such restrictions as may be set forth in regulations which the Administrator shall prescribe, pursuant to subsection (b) of this section, as to materiality, relevance, and undue repetition;

(C) to make oral argument and submit written contentions, in the form of a brief or similar document, on substantive and procedural issues;

(D) to submit rebuttal evidence;

(E) to present medical opinions and request an independent advisory medical opinion pursuant to section 4009(c) of this title; and

(F) to serve written interrogatories on any person, including any employee of the Veterans' Administration, which interrogatories shall be answered separately and fully in writing and under oath unless written objection thereto, in whole or in part, is filed with the Administrator by the person to whom the interrogatories are directed or such person's representative.

(2) The fee provided for in paragraph (1)(A) of this subsection may be waived by the Administrator, pursuant to regulations which the Administrator shall prescribe, on the basis of the party's inability to pay or for other good cause shown.

(3) In the event of any objection filed under paragraph (1)(F) of this subsection, the Administrator shall, pursuant to regulations which the Administrator shall prescribe establishing standards consistent with standards for protective orders applicable in the United States District Courts, evaluate such objection and issue an order (A) directing that, within such period as the Administrator shall specify, the interrogatory or interrogatories objected to be answered as served or answered after modification, or (B) indicating that the interrogatory or interrogatories are no longer required to be answered.

(4) If any person upon whom interrogatories are served under paragraph (1)(F) of this subsection fails to answer or fails to provide responsive answers to any such interrogatories within 30 days after service or such additional time as the Administrator may allow, the Administrator shall, upon a statement or showing by the party who served such interrogatories of general relevance and reasonable scope of the evidence sought, issue a subpena under section 3311 of this title (with enforcement of such subpena to be available under section 3313 of this title) for such person's appearance and testimony on such interrogatories at a deposition on written questions, at a location within 100 miles of where such person resides, is employed, or transacts business.

(d) In the course of any hearing, investigation, or other proceeding in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration, an employee of the Veterans' Administration may at any time disqualify himself or herself, on the bais of personal bias or other cause, from adjudicating the claim. On the filing by a party in good faith of a timely and sufficient affidavit averring personal bias or other cause for disqualification on the part of such an employee, the Administrator shall determine the matter as a part of the record and decision in the case.

(e) The transcript or recording of testimony and the exhibits, together with all papers and requests filed in the proceeding, and the decision of the Board (1) shall constitute the exclusive record for decision in accordance with section 4004(a) of this title, (2) shall be available for inspection by any party to such proceeding, or such party's authorized representative, at reasonable times and places, and (3) on the payment of a fee prescribed under section 3302(b) of this title (not to exceed the direct cost of duplication), shall be copied for the claimant or such claimant's authorized representative

within a reasonable time. Such fee may be waived by the Administrator, pursuant to regulations which the Administrator shall prescribe, on the basis of the party's inability to pay or for other good cause shown.

(f) Notwithstanding section 4004(a) of this title, section 554(a) of title 5, or any other provision of law, adjudication and hearing procedures prescribed in this title and in regulations prescribed by the Administrator under this title for the purpose of administering veterans' benefits shall be exclusive with respect to hearings, investigations, and other proceedings in connection with the consideration of a claim for benefits under laws administered by the Veterans' Administration.

§ 4011. Notice of procedural rights

In the case of any disallowance, in whole or in part, of a claim for benefits under laws administered by the Veterans' Administration, the Administrator shall, at each procedural stage relating to the disposition of such a claim, beginning with disallowance after an initial review or determination, and including the furnishing of a statement of the case and the making of a final determination by the Board, provide to the claimant and such claimant's authorized representative, if any, written notice of the procedural rights of the claimant. Such notice shall be on such forms as the Administrator shall prescribe by regulation and shall include, in easily understandable language, with respect to proceedings before the Veterans' Administration, (1) descriptions of all subsequent procedural stages provided for by statute, regulation, or Veterans' Administration policy, (2) descriptions of all rights of the claimant expressly provided for in or pursuant to this chapter, of the claimant's rights to a hearing, to reconsideration, to appeal, and to representation, and of any specific procedures necessary to obtain the various forms of review available for consideration of the claim, and (3) such other information as the Administrator, as a matter of discretion, determines would be useful and practical to assist the claimant in obtaining full consideration of the claim.

Subchapter II—Judicial Review

§ 4025. Right of review; commencement of action

(a) For the purposes of this chapter—

(1) "final decision of the Administrator" means—

(A) a final determination of the Board of Veterans' Appeals pursuant to section 4004 (a) or (b) of this title; or

(B) a dismissal of an appeal by the Board of Veterans' Appeals pursuant to section 4005 or 4008 of this title; and

(2) "claim for benefits" means—

(A) an initial claim filed under section 3001 of this title;

(B) a challenge to a decision of the Administrator reducing, suspending, or terminating benefits; or

(C) any request by or on behalf of the claimant for reopening, reconsideration, or further consideration in a matter described in clause (A) or (B) of this paragraph.

(b) Except as provided in subsection (f) of this section, after any final decision of the Administrator adverse to a claimant in a

matter involving a claim for benefits under any law administered by the Veterans' Administration, such claimant may obtain a review of such decision in a civil action commenced within 180 days after notice of such decision is mailed to such claimant pursuant to section 4004(d) of this title. Such action shall be brought against the Administrator in the district court of the United States for the judicial district in which the plaintiff resides or the plaintiff's principal place of business is located, or in the district court of the United States for the judicial district where the principal offices of the Board of Veterans' Appeals (established under section 4001 of this title) are located.

(c) The complaint initiating an action under subsection (a) of this section shall contain sufficient information to permit the Administrator to identify and locate the plaintiff's records in the custody or control of the Veterans' Administration.

(d) Not later than 30 days after filing the answer to a complaint filed pursuant to subsection (a) of this section, the Administrator shall file a certified copy of the records upon which the decision complained of is based or, if the Administrator determines that the cost of filing copies of all such records is unduly expensive, the Administrator shall file a complete index of all documents, transcripts or other materials comprising such records. After such index is filed and after considering requests from all parties, the court shall require the Administrator to file certified copies of such indexed items as the court considers relevant to its consideration of the case.

(e) In an action brought pursuant to subsection (b) of this section, the court shall have the power, upon the pleadings and the records specified in subsection (d) of this section, to enter judgment in accordance with section 4026 of this title or remand the cause in accordance with such section or section 4027 of this title.

(f)(1) No action may be brought under this section unless (A) the initial claim for benefits is filed pursuant to section 3001 of this title on or before the last day of the fifth fiscal year beginning after the effective date of this section, and (B) the complaint initiating such action is filed not more than 180 days after notice of the first final decision of the Administrator rendered after the last day of such fiscal year is mailed to the claimant pursuant to section 4004(d) of this title. If the case is reopened pursuant to section 4004(b)(2)(A) of this title within 180 days after such notice is mailed, the next final decision shall, for purposes of this subsection, be considered the first final decision of the Administrator.

(2) No action may be brought under this section with respect to matters arising under chapters 19 and 37 of this title.

§ 4026. Scope of review

(a)(1) In any action brought under section 4025 of this title, the court, to the extent necessary to its decision and when presented, shall—

(A) decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an action of the Administrator;

(B) compel action of the Administrator unlawfully withheld;

(C) hold unlawful and set aside decisions, findings (other than those described in clause (D) of this paragraph), and conclusions of the Administrator found to be—

(i) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(ii) contrary to constitutional right, power, privilege, or immunity;

(iii) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

(iv) without observance of procedure required by law; and

(D) in the case of a finding of material fact made in reaching a decision on a claim for benefits under laws administered by the Veterans' Administration, hold unlawful and set aside such finding when it is so utterly lacking in a rational basis in the evidence that a manifest and grievous injustice would result if such finding were not set aside.

(2) Before setting aside any finding of fact under paragraph (1)(D) of this subsection, the court shall specify the deficiencies in the record upon which the court would set aside such finding and shall remand the case one time to the Administrator for further action not inconsistent with the order of the court in remanding the case. In remanding a case under the first sentence of this paragraph, the court shall specify a reasonable period of time within which the Administrator shall complete the ordered action. If the Administrator does not complete action on the case within the specified period of time, the case shall be returned to the court for its further action.

(b) In making the determinations under subsection (a) of this section, the whole record before the court pursuant to section 4025(d) of this title shall be subject to review, and the court shall review those parts of such record cited by a party, and due account shall be taken of the rule of prejudicial error.

(c) In no event shall findings of fact made by the Administrator be subject to trial de novo by the court.

(d) When a final decision of the Administrator is adverse to a party and the sole stated basis for such decision is the failure of such party to comply with any applicable regulation of the Veterans' Administration, the court shall review only questions raised as to compliance with and the validity of the regulation.

§ 4027. Remands

(a)(1) In any action brought under section 4025 of this title, the court shall, on motion of the Administrator made before the expiration of the time specified for the filing of an answer to a complaint filed pursuant to subsection (b) of such section, allow a single remand of a case to the Administrator for further review by the Administrator. If such review is not completed within 90 days after the date of such remand, the matter shall be returned to the court for its action.

(2)(A) At any time after the Administrator files an answer, the court may, in the exercise of its discretion, remand the case to the Administrator for further action by the Administrator.

(B) If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there is good

cause for granting such leave, the court shall remand the case to the Administrator and order such additional evidence to be taken by the Administrator.

(C) In the case of a remand under subparagraph (A) or (B) of this paragraph, the court may specify a reasonable period of time within which the Administrator shall complete the required action.

(b) After a case is remanded to the Administrator under subsection (a) of this section, and after further action by the Administrator, including consideration of any additional evidence, the Administrator shall modify, supplement, affirm, or reverse the findings of fact or decision, or both, and shall file with the court any such modification, supplementation, affirmation, or reversal of the findings of fact or decision or both, as the case may be, and certified copies of any additional records and evidence upon which such modification, supplementation, affirmation, or reversal was based. Any such modification, supplementation, affirmation, or reversal of the findings of fact or decision shall be reviewable by the court only to the extent provided in section 4026 of this title.

§ 4028. Survival of actions

Any action brought under section 4025 of this title shall survive, notwithstanding any change in the person occupying the office of Administrator or any vacancy in such office.

§ 4029. Appellate review

The decisions of a district court pursuant to this chapter shall be subject to appellate review by the courts of appeals and the Supreme Court of the United States in the same manner as judgments in other civil actions.

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